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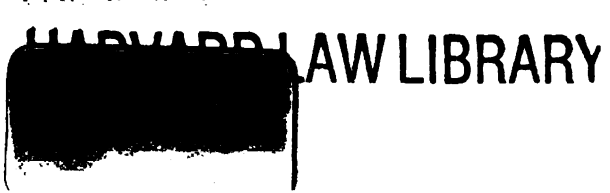
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27

43

CIVIL PROCEDURE REPORTS

CONTAINING CASES UNDER THE

CODE OF CIVIL PROCEDURE

AND

THE GENERAL CIVIL PRACTICE

OF THE

STATE OF NEW YORK.

REPORTED WITH NOTES
BY
H. HUFFMAN BROWNE,
OF THE NEW YORK BAR.

WITH A REFERENCE TO THE SECTIONS OF THE CODE OF CIVIL PROCEDURE CONSTRUED OR CITED IN THE OPINIONS CONTAINED IN THE FOLLOWING REPORTS, ISSUED DURING THE PERIOD COVERED BY THIS VOLUME: NEW YORK REPORTS, VOLS. 129, 130, 131, 132, 133; HUN'S REPORTS, VOLS. 62, 63, 64; DALY'S REPORTS, VOL. 16; AND NEW YORK CIVIL PROCEDURE REPORTS, VOL. 22.

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CONTENTS.

Sections of the Code of Civil Procedure.		Page
23	MACDONALD *v.* KIEFERDORF. Mandate; what defects in, disregarded.	105
46	*In re* CITY OF MIDDLETOWN. Commissioners to lay out streets; when not disqualified because related to one owning property affected.	12
66	POOLES *v.* BELCHA. Attorney's lien; when enforceable and how enforced.	67
66	MARVIN *v.* MARVIN. Attorney's lien; when not affected by assignment of judgment.	274
	Note on Effect of Certain Assignments on Attorney's Liens	279
315	GLOBE YARN MILLS *v.* BILBROUGH. City court of New York; jurisdiction of action brought by foreign corporation against domestic corporation.	186
382, 388	BOWMAN *v.* HOFFMAN. Limitation to action to foreclose lien on chattel.	371
390	BEER *v.* SIMPSON. Limitation to action; *lex fori* governs.	351
399	RILEY *v.* RILEY. Limitation to action; delivery of process to sheriff for service; death of defendant before service.	318
406	BEST *v.* DAVIS SEWING MACHINE CO. Limitation to action; when not extended by adjudication preventing bringing of action.	362
410	BOWMAN *v.* HOFFMAN. Limitation to action to foreclose lien on chattel.	371
421	MCKENNA *v.* DUFFY. Appearance; when evidence of authority to appear must be shown.	366

Sections of the Code of Civil Procedure.		Page.
421	BELL *v.* GOOD..... Appearance; obtaining extension of time to answer, when not.	356
423, 424	BELL *v.* GOOD..... Appearance; obtaining extension of time to plead is; waiver.	317
424	BELL *v.* GOOD..... Same subject.	356
424	MCKENNA *v.* DUFFY..... Appearance; attorney's authority to serve notice of, when must be shown.	366
427	FELDMAN *v.* GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN..... Interpleader; service of notice of application for, on infants.	165
431	JEPSON *v.* POSTAL TELEGRAPH CABLE CO..... Service of summons on corporation; who is not managing agent.	433
432	GLINES *v.* SUPREME SITTING ORDER OF IRON HALL. Service of summons on foreign corporation; proof when insufficient.	436
432	MARKS *v.* LA SOCIETE ANONYME DE L'UNION DES PAPETERIES..... Service of summons; when party coming within the state to testify as witness not exempt from.	201
468, 481	HOPKINS *v.* FREY..... Guardian *ad litem* of infant defendant; failure to serve general answer does not invalidate judgment.	415
481	THOMAS *v.* NEW YORK AND GREENWOOD LAKE R. R. CO..... Pleading; when complaint does not state sufficient facts.	326
483, 484	LAMMING *v.* GALUSHA..... Pleading; cause of action for nuisance cannot be united with cause of action for damages for personal injuries. Separately stating and numbering causes of action.	16
488	ROWLAND *v.* MILLER..... Pleading; complaint in action for ejectment.	25
494	SAWYER *v.* BENNETT..... Pleading in action for libel; plea of justification is new matter; when insufficient.	343
497	THOMPSON *v.* STANLEY..... Pleading over after demurrer; what costs taxable.	348
508	SAWYER *v.* BENNETT..... Partial defense in action for libel.	343
519	THOMAS *v.* NEW YORK & GREENWOOD LAKE R. R. CO..... Pleading; rule as to construction of.	326

Sections of the Code of Civil Procedure.		Page
528, 529	BECKLEY *v.* CHAMBERLAIN.... Verification of pleading; when cannot be omitted in action for deceit and false representation.	338
581	ROWLAND *v.* MILLER.... Pleading; complaint in action for ejectment when insufficient. Bill of particulars.	25
581	MELLENS *v.* MELLENS.... Bill of particulars; when not ordered of professional services rendered as attorney.	39
539, 540	BOWEN *v.* SWEENEY.... Pleading; amendment of complaint on trial; variance.	79
545	HIGGINS *v.* HOPPOCK.... Pleading; what matter not stricken out of, on motion.	318
546	ROWLAND *v.* MILLER.... Pleading; complaint in action for ejectment when not made more definite and certain.	25
549	MOFFATT *v.* FULTON.... Pleading; when insufficiency of complaint not properly objected to; when defendant may be arrested in action to recover money or property converted.	126
604	CAMPBELL *v.* ERNEST.... Injunction; when not granted to restrain disposition of property pending action.	218
635 *et seq.*	GWALTER *v.* NEW YORK SEAL PLUSH AND TAPESTRY CO.... Attachment; when motion to vacate properly denied.	214
635 *et seq.*	DIETLIN *v.* EGAN.... Attachment; when motion to vacate may be denied.	398
635 *et seq.*	ADLER *v.* ORDER OF AMERICAN FRATERNAL CIRCLE OF BALTIMORE CITY.... Attachment; what must be shown in action against foreign corporation.	336
641	MACDONALD *v.* KIEFERDORF.... Attachment; what objections to, cannot be taken for first time on appeal; when should be vacated.	105
682	DAYTON *v.* MCELWEE MANUFACTURING COMPANY.... Attachment; what must be shown by junior attaching creditor on motion to vacate.	227
712, 721–725	TUCK *v.* MANNING....	94
	WILSHIRE *v.* SAME....	94
	AMY *v.* SAME.... Attachment; return of, when to be made; cancellation of improper return.	94

Sections of the Code of Civil Procedure.		Page
723	BRADLEY *v.* SHAFER.... Amendment of complaint; when should not be ordered on trial; basis of damage in action by parent for enticing away of his child.	399
755	GRAFTON *v.* UNION FERRY CO. OF BROOKLYN..... Abatement of action for personal injury on dissolution of corporate defendant.	402
755 *et seq.*	*Hepworth v. Union Ferry Co. of Brooklyn*..... 407 *note* Revival of action for assault after dissolution of corporation.	
757	KNOCH *v.* FUNKE.... Reviving action against an executor of deceased defendant; when security for costs may be required.	161
803 *et seq.*	FROMME *v.* LISTLER.... Inspection of documents; affidavit, when insufficient; showing merits.	87
820	DODGE *v.* LAWSON.... Interpleader; power of court on motion for; when denied because amount claimed not admitted.	112
820	FELDMAN *v.* GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN.... Interpleader; claim must have some reasonable foundation; notice of application; amount of deposit.	165
829	BOWEN *v.* SWEENEY.... Testimony by tenant by the courtesy initiate to conversations with decedent through whom his wife claims.	79
834	FISHER *v.* FISHER.... Privileged communication; to what physician may testify.	48
834	PATTEN *v.* UNITED LIFE AND ACCIDENT INS. CO.... Privileged communication; what communication to physician is not.	247
841	PEOPLE *ex rel.* GRIFFIN *v.* RYDER.... Partition; distribution of money unclaimed paid into court.	388
870	DOUGLASS *v.* MEYER.... Examination of party before trial; when order for, properly granted.	345
870 *et seq.*	FATMAN *v.* FATMAN.... Examination of party before trial; sufficiency of affidavit; scope.	149
870 *et seq.*	SMITH *v.* RENTZ.... Documentary evidence; when production of books pursuant to notice or on examination before trial does not make it necessary to introduce them in evidence.	27

Sections of the Code of Civil Procedure.		Page
887 *et seq.*	KAEMPFER *v.* GORMAN Commission; when open not granted.	34
887, 888	*In re* PLUMB Commission; may issue out of surrogate court.	209
900	GRISSEN *v.* SOUTHWORTH Commission; when irregularity in executing waived.	184
910	MICHEL *v.* COLEGROVE Commission; suppression of.	297
910	MICHEL *v.* COLEGROVE Same subject.	304
968	WESTON *v.* STODDARD Costs; award of, in action for partition.	51
977	GOWING *v.* LEVY Effect of notice of trial for term for which note of issue not filed.	10
984	PENNIMAN *v.* FULLER & WARREN CO. Place of trial; when demand for change of may be served with amended answer.	205
1002	MICHEL *v.* COLEGROVE New trial; motion for, on newly discovered evidence; suppression of commission.	297
1002	MICHEL *v.* COLEGROVE New trial; when not granted on newly discovered evidence; suppression of commission.	304
1010	THOMPSON *v.* STANLEY Decision; form of, on determining issue of law.	420
1011	LENNON *v.* SMITH Reference; when new trial must be had before referee after reversal of former judgment.	23
1023	GILMAN *v.* PRENTISS Findings; when omission of, prevents review on appeal.	143
1023	HUNTER *v.* MANHATTAN RAILWAY CO. Findings; notation on request to find.	309
1023	THOMPSON *v.* STANLEY Decision; form of, on determining issue of law.	420
1904	POWERS *v.* SAVIN What claims may be liquidated between defendants; evidence; books when not competent.	353
1366	NATIONAL EXCHANGE BANK *v.* BURKHALTER Execution; return of, when required although sixty days has not elapsed since it was issued.	414
1380	*In re* MATTESON Execution against estate of decedent; when leave to issue granted.	241
1405	SICKLES *v.* SULLIVAN Execution; priority of, over claim of receiver.	322
1500	READ *v.* SIMON Ejectment; severance of action on death of one of several defendants.	196

Sections of the Code of Civil Procedure.		Page
1511	ROWLAND *v.* MILLER. Pleading; complaint in action for ejectment when insufficient.	25
1523, 1526	READ *v.* SIMON. Ejectment; severance where one of the plaintiffs dies *pendente lite.*	196
1537	BOWEN *v.* SWEENEY. Partition; pleading in, where devise attacked as invalid.	79
1537	*Note on Action for Partition of Real Property by an Heir-at-Law who asserts that an apparent devise thereof is void.*	87
1579, 1580	MCKENNA *v.* DUFFY. Partition; when provision in judgment for payment of share of party to his attorney improper.	366
1582	PEOPLE *ex rel.* GRIFFIN *v.* RYDER. Partition; distribution of unclaimed money paid into court.	388
1636 *et seq.*	DUDLEY *v.* CONGREGATION OF THE THIRD ORDER OF ST. FRANCIS. Action to foreclose mortgage; judgment cannot be granted on bond where mortgage held invalid.	380
1636 *et seq.*	FRANK *v.* DAVIS. Action to foreclose mortgage; when judgment for deficiency may be granted after sale of mortgaged premises under prior mortgage.	425
1779	GLOBE YARN MILLS *v.* BILBROUGH. City court of New York; jurisdiction of action brought by foreign corporation against domestic corporation.	186
1780	PARRY *v.* ERIE TRANSFER COMPANY. Jurisdiction of action against foreign corporation; when objection properly taken; when court without jurisdiction.	178
1780	ADLER *v.* ORDER OF AMERICAN FRATERNAL CIRCLE OF BALTIMORE CITY. Attachment; what must be shown in action against foreign corporation.	336
1810	GLINES *v.* SUPREME SITTING ORDER OF IRON HALL. Receiver; when may be appointed of corporation.	436
1835, 1836	RUTH *v.* DAVENPORT. Costs; when executors not charged with, in action against them.	121
1835, 1836	EFFRAY *v.* MASSEN. Costs; award of, against executor or administrator in the city court of New York.	59
1900	ATTLEBORO NATIONAL BANK *v.* WENDELL. Costs; liability of attorney for, where action brought in name of non-existing corporation.	235

Sections of the Code of Civil Procedure.		Page
2007	PEOPLE *ex rel.* MEYER *v.* MASONIC GUILD AND MUTUAL BENEFIT ASSOCIATION. Mandamus; when non-payment of costs awarded on motion for peremptory, not punished as a contempt.	74
2125, 2133	PEOPLE *ex rel.* CONNOR *v.* PURROY. Certiorari; practice where writ not applied for in time.	116
2432 *et seq.*	MEYERS *v.* HERBERT. Supplementary proceedings; when abandoned; what use of property is not contempt	216
2432 *et seq.*	DUFFY *v.* DAWSON.	235
2441	Supplementary proceedings; moneys paid to sheriff, how applied.	
2285	FUCHS *v.* COHN. Forcible entry and detainer; petition.	269
2235, 2265	*Cahill v. Wyand*. Forcible entry and detainer; insufficient petition; enjoining execution of warrant.	271 note
2389	DUNN *v.* HUETHER. Committee of insane person; power of court to dispose of property of, or release dower.	118
2447	MCSHANE *v.* PINKHAM. Proceedings supplementary to execution; when money deposited in lieu of bail cannot be reached.	178
2530, 2531	*In re* MARY MONELL. Special guardian; appointment of not affected by subsequent appointment of general guardian.	377
2538	*In re* PLUMB. Commission; may issue out of surrogate court.	209
2624	*In re* WILL OF CORNELIA L. SCHROEDER, DECEASED. Surrogate's court; jurisdiction of, to construe will.	55
2717	ESTATE OF MODERNO. Executors and administrators; petition for payment of debt.	72
2868	GOULD *v.* PATTERSON. Justice's court; question of title to land.	230
2879	JEPSON *v.* POSTAL TELEGRAPH CABLE CO. Service of summons on corporation; managing agent.	433
2951-2956	GOULD *v.* PATTERSON. Justice's court; question of title to land when does not deprive county court of jurisdiction of appeal.	230
3050	JANEWAY *v.* HAFT. Undertaking on appeal from justice's court; liability of sureties.	290
3057	JOURDAN *v.* HEALEY. District court in city of New York: use of affi-	157

Sections of the Code of Civil Procedure.		Page
	davits on appeal from; when justice may adjourn action after trial commenced.	
3165	BELL *v.* GOOD..... Appearance; what is not; time to answer in city court of New York where summons served without the state.	356
3169, subd. 1	ROTHSCHILD *v.* DITHREDGE FLINT GLASS COMPANY. Attachment; principal office of corporation.	314
3191	HORN *v.* TERRY..... Appeal from city court of New York to court of common pleas; defective return.	430
3228	MATTES *v.* PAUSE..... Costs; award of, by what statute governed in action removed to court of common pleas from district court.	41
3228, 3229	WESTON *v.* STODDARD..... Costs; award of in action for partition.	51
3228, 3229	KEMP *v.* UNION GAS AND OIL STOVE COMPANY.... Costs; when defendant entitled to, because plaintiff recovers less than $50 and action is within jurisdiction of district court.	190
3234	BROWNING *v.* LAKE ERIE & WESTERN R. R. Co.... Costs; when both parties to action entitled to.	198
3234	BURNS *v.* DELAWARE, LACKAWANNA & WESTERN R. R. Co..... Costs; when both parties to action entitled to.	43
3240	PEOPLE *v.* PRATT..... Costs; what taxable in special proceeding.	394
3247	O'CONNOR *v.* MECHANICS' BANK..... Judgment creditor; when liable for costs incurred by receiver.	392
3251	GOWING *v.* LEVY..... Costs; trial fee when not taxable; term fee when not taxable; effect of notice of trial for term for which note of issue not filed.	10
3253	BRADLEY *v.* WALKER..... Additional allowance; when not granted because no basis upon which to compute.	1
3253	DR. JAEGER'S SANITARY WOOLEN SYSTEM Co. *v.* LE BOUTILLIER.....	6
	SAME *v.* LOESER..... Additional allowance; when cannot be granted where trade-mark subject of action.	6
3256	SEASONGOOD *v.* NEW YORK ELEVATED R. R. Co.... Disbursements; when stenographer's fees not taxable.	100
3271	KNOCH *v.* FUNKE..... Security for costs; when may be required on reviving action.	161

Sections of the Code of Civil Procedure.		Page
3296	GRIGGS *v.* DAY..... Referee's fees; stipulation permitting referee to fix amount of invalid.	146
3343	EFFRAY *v.* MASSEN..... City court of New York is not a superior city court.	59
3347	MATTES *v.* PAUSE..... Costs; award of, by what statute governed in action removed to court of common pleas from district court.	41

TABLE OF CASES REPORTED.

A.

Page

Adler *v.* Order of American Fraternal Circle of Baltimore City..... 336
Amy *v.* Manning..... 94
Attleboro Nat'l Bank *v.* Wendell..... 225

B.

Beckley *v.* Chamberlain..... 338
Beer *v.* Simpson..... 351
Belcha, Poole *v.* 67
Bell *v.* Good..... 317
Bell *v.* Good 356
Bennett, Sawyer *v.* 343
Best *v.* Davis Sewing Machine Co..... 362
Bilbrough, Globe Yarn Mills *v.* 186
Bowen *v.* Sweeny..... 79
Bowman *v.* Hoffman..... 371
Bradley *v.* Shafer..... 299
Bradley *v.* Walker..... 1
Browning *v.* New York, Lake Erie & Western R. R. Co.. 190
Burkhalter, National Exchange Bank *v.*..... 414
Burns *v.* Delaware, Lack. & Western R. R. Co..... 43

C.

Chamberlain, Beckley *v.*..... 338
City of Middletown, *In re*.... 12
Cohn, Fuchs *v.*..... 269
Colegrove, Michel *v.*..... 297
Colegrove, Michel *v* 304

Page

Congregation of Third Order of St. Francis, Dudley *v*.... 380
Connor, People *ex rel.*, v. Purroy..... 116

D.

Davenport, Ruth *v*..... 121
Davis, Frank *v.* 426
Davis Sewing Machine Co., Best *v*..... 362
Dawson, Duffy *v*..... 235
Day, Griggs *v*..... 146
Dayton *v.* McElwee M'f'g. Co. 227
Delaware, Lack. & Western R. R. Co., Burns *v*..... 43
Dietlin *v.* Egan..... 398
Dithredge Flint Glass Co., Rothschild *v*..... 314
Dr. Jaeger's Sanitary Woolen System Co. *v.* Le Boutillier 7
Dr. Jaeger's Sanitary Woolen System Co. *v.* Loeser..... 7
Dodge *v.* Lawson..... 112
Douglass *v.* Meyer 345
Dudley *v.* Congregation of Third Order of St. Francis..... 380
Duffy *v.* Dawson..... 235
Duffy, McKenna *v*..... 366
Dunn *v.* Heuther..... 116

E.

Effray *v.* Massen..... 59
Egan, Dietlin *v*..... 398
Erie Transfer Co., Parry *v*.. 178

F.

Page
Fatman v. Fatman..... 149
Feldman v. Grand Lodge of the Ancient Order of United Workmen..... 165
Fisher v. Fisher..... 49
Frank v. Davis..... 426
Frey, Hopkins v..... 416
Froome v. Listler..... 87
Fuchs v. Cohn..... 269
Fuller & Warren Co., Penniman v..... 205
Fulton, Moffatt v..... 126
Funke, Knoch v..... 161

G.

Galusha, Lamming v..... 16
Gilman v. Prentiss..... 143
Globe Yarn Mills v. Bilbrough 186
Glines v. Supreme Sitting Order of Iron Hall..... 437
Good, Bell v..... 317
Good, Bell v..... 356
Gorman, Kempfer v..... 34
Gould v. Patterson..... 230
Gowing v. Levy..... 10
Grafton v. Union Ferry Co. 402
Grand Lodge of the Ancient Order of United Workmen, Feldman v..... 165
Griffin, People *ex rel.*, v. Ryder 388
Griggs v. Day..... 146
Gwalter v. New York Seal Plush & Tapestry Co.... 214

H.

Haft, Janeway v..... 291
Healey, Jourdan v..... 157
Hepworth v. *Union Ferry Co.*, 407, *note*
Herbert, Meyers v..... 216
Heuther, Dunn v..... 116
Hoffman, Bowman v..... 371
Higgins v. Hoppock..... 313
Hopkins v. Frey..... 416
Hoppock, Higgins v..... 313
Horn v. Terry..... 451
Hunter v. Manhattan Railway Co..... 309

J.

Janeway v. Haft..... 291
Jepson v. Postal Telegraph Cable Co..... 433
Jourdan v. Healey..... 157

K.

Kempfer v. Gorman..... 34
Kiefferdorf, McDonald v.... 105
Knoch v. Funke..... 161

L.

Lamming v. Galusha..... 16
La Société Anonyme de l'Union des Papeteries, Marks v..... 201
Lawson, Dodge v..... 113
Le Boutillier, Dr. Jaeger's Sanitary Woolen System Co. v..... 7
Lennon v. Smith..... 23
Levy, Gowing v..... 10
Listler, Fromme v..... 87
Loeser, Dr. Jaeger's Sanitary Woolen System Co. v..... 7

M.

McDonald v. Kiefferdorf..... 105
McElwee M'f'g. Co., Dayton v..... 227
McKenna v. Duffy..... 366
Marks v. La Société Anonyme de l'Union des Papeteries... 201
Massen, Effray v..... 59
Manhattan Railway Co., Hunter v..... 309
Manning, Amy v..... 94
Manning, Tuck v..... 94
Manning, Wilshire v..... 94
Marvin v. Marvin..... 274
Masonic Guild & Mutual Benefit Assoc., People v..... 74

Page

Masonic Guild & Mutual Benefit Assoc., People v..... 79
Mattes v. Pause..... 41
Matteson, *In re*..... 41
Mechanic's Bank, O'Connor v. 393
Meyer, Douglass v..... 345
Meyers v. Herbert..... 316
Michel v. Colegrove..... 297
Michel v. Colegrove..... 304
Middletown, *In re* City of.... 12
Miller, Rowland v..... 25
Moderno, Estate of..... 72
Moffatt v. Fulton..... 126
Monell, *In re* Mary..... 377
Moshane v. Pinkham..... 173

N.

National Exchange Bank v. Burkhalter..... 414
New York & Greenwood Lake Railway Co., Thomas v..... 326
New York Elevated R. R. Co., Seasongood v..... 100
New York, Lake Erie and Western R. R. Co., Browning v..... 190
New York Seal Plush & Tapestry Co., Gwalter v..... 214

O.

O'Connor v. Mechanic's Bank 393
Order of American Fraternal Circle of Baltimore City, Adler v..... 336

P.

Parry v. Erie Transfer Co.... 178
Patterson, Gould v..... 280
Pause, Mattes v..... 41
Penniman v. Fuller & Warren Co..... 205
People v. Masonic Guild & Mutual Benefit Assoc..... 74
People v. Masonic Guild & Mutual Benefit Assoc..... 79
People v. Pratt 294
People *ex rel.* Connor v. Purroy 116
People *ex rel.* Griffin v. Ryder 388
Petten v United Life & Accident Ins. Co..... 247
Pinkham, Moshane v..... 173
Plumb, *In re*..... 209
Poole v. Belcha..... 67
Postal Telegraph Cable Co., Jepson v..... 434
Powers v. Savin..... 253
Pratt, People v..... 294
Prentiss, Gilman v..... 143
Purroy, People *ex rel.* Connor v. 116

R.

Read v. Simon..... 196
Rentz, Smith v..... 27
Riley v. Riley..... 318
Rothschild v. Dithredge Flint Glass Co..... 314
Rowland v. Miller..... 25
Ruth v. Davenport..... 121
Ryder, People *ex rel.* Griffin v. 388

S.

Sawyer v. Bennett..... 343
Savin, Powers v..... 253
Schraeder, *In re*..... 55
Seasongood v. New York Elevated R. R. Co..... 100
Shafer, Bradley v..... 299
Sickle v. Sullivan..... 322
Simon, Read v..... 196
Simpson, Beer v..... 351
Smith, Lennon v..... 22
Smith v. Rentz..... 27
Stanley, Thompson v..... 348
Stanley, Thompson v..... 421
Stoddard, Weston v..... 51
Sullivan, Sickle v..... 322
Supreme Sitting Order of Iron Hall, Glines v..... 437
Sweeny, Bowen v..... 79

T.

Page
Terry, Horn v. 431
Thomas v. New York & Greenwood Lake R. R. Co. 326
Thompson v. Stanley 348
Thompson v. Stanley 421

U.

Union Ferry Co., Grafton v. .. 402
Union Ferry Co., Hepworth v., 407, *note*
United Life & Accident Ins. Co., Petten v. 247

W.

Walker, Bradley v. 1
Wendell, Attleboro Nat'l Bank v. 235
Weston v. Stoddard 51
Wilshire v. Manning 94

TABLE OF CASES CITED

IN THE OPINIONS.

a—affirmed ; ap—approved ; ap dis—appeal dismissed ; cf—confirmed ; d—distinguished ; ex—explained ; f—followed ; mod—modified ; nf—not followed ; o—overruled ; q—questioned ; r—reversed.

A.

Cases.	Where Reported.	Page Cited.
Aberhall v. Roach	11 How. Pr. 95	157, d 159
Acer v. Westcott	46 N. Y. 384	5
Adams v. Arkenburgh	106 N. Y. 615	f 8
Adams v. Bowerman	109 N. Y. 23	260, 267
Adams v. N. Y., Lake Erie & W. R. R. Co.	20 Abb. N. C. 180	100, 104
Adams v. Popham	76 N. Y. 410	18
Adams v. Rivers	11 Barb. 390	238
Adsit v. Wilson	7 How. Pr. 64	159
Adsit v Butler	87 N. Y. 585	f 320
Althause v. Radde	3 Bosw. 410	419
Anderson v. West	9 Abb. Pr. N. S. 209	36
Andrews v. Montgomery	19 Johns. 165	354
Anon	3 Sandf. 756	350
Anon	7 Wend. 331	298
Arnold v. Angel	62 N. Y. 508	389
Atlantic, etc., Tel. Co. v. Baltimore, etc., R. R. Co.	46 Supr. Ct. R. 377	111
Austin v. Thomson	45 N. H. 113	31

B.

Bailey v. Drew	17 St. R. 185	373, f 375
Baker v. Gilman	52 Barb. 26	410
B. & O. Co. v. Arthur	90 N. Y. 234	114, 115
Bank v. Colby	21 Wall. 609	405

Cases.	Where Reported.	Page Cited.
Barker v. Binninger	14 N. Y. 270, 278	98
Barnes v. Morgan	3 Hun, 703	240
Barnes v. Prince	1 City Ct. R. 259	241
Bartlett v. Sutorius	17 N. Y. Civ. Pro. 259	135
Bastable v. Syracuse	72 N. Y. 64	431
Beach v. The Mayor	14 Hun. 79	d 347
Bell v. Good	22 N. Y. Civ. Pro. 316	r 356
Bender v. Sherwood	15 How. Pr. 258	115
Benjamin v. Benjamin	17 Conn. 110	289
Bennett v. Bennett	116 N. Y. 597	302
Bert v. Oneida Community	12 N. Y. Supp. 806	149
Bieder v. Baker	88 N. Y. 156	f 207
Biglow v. Sanders	22 Barb. 147	159
Billings v. Vanderbeck	15 How. 295	24
Bishop v. Garcia	14 Abb. Pr. N. S. 69	289
Blake v. Russ	33 Me. 360	32
Blashfield v. Blashfield	42 Hun, 249	nf 47
Bloom v. Burdick	1 Hill. 131	270
Blossom v. Estes	84 N. Y. 614	111
Blumenthal v. Hudson B. & S. M. Co.	21 N. Y. Civ. Pro. 217	d 316
Bowen v. Sweeney	22 N. Y. Civ. Pro. 79	88
Bowman v. Earle	3 Duer, 695	301
Boyer v. Clark	3 Neb. 161	289
Bradley v. Aldrich	40 N. Y. 504	386
Bradley v. Walker	14 N. Y. Supp. 315	f 8
Bridger v. Weeks	30 N. Y. 328	143, f 145
Bristed v. Weeks	5 Redf. 529	213
Brownell v. Hawkins	4 Barb. 491	373
Bruen v. Gillett	44 Hun, 298	108
Budd v. Bingham	18 Barb. 494	27
Bull v. Faulkner	2 De G. & S. 772	281
Bull v. Kendrick	4 Daly, 330	213
Burnham v. Brennan	42 N. Y. Super. Ct. 49	98
Burns v. Del., Lack. & W. R. R. Co.	22 N. Y. Civ. Pro. 43	f 194
Burroughs v. Fostevan	75 N. Y. 567	428
Burt v. Oneida Com	21 Week. Dig. 342	154, 156
Butler v. Flanders	44 N. Y. Super. 531	306

C.

Cadmus v. Oakley	2 Dem. 298	213
Calvert v. Flower	7 Car. & P. 386	31
Carlton v. Goldman	5 Civ. Pro. 153	76
Carradine v. Hotchkiss	120 N. Y. 608	29
Carter v. Beckwith	104 N. Y. 239; s. c., 5 St. Rep. 617	65

C.

Cases.	Where Reported.	Page Cited.
Carter v. Good	57 Hun, 116; s. c., 32 St. Rep. 501	154
Carter v. Wallace	3 How. Pr. N. S. 354	23
Catlin v. Adirondack Co	19 Hun, 389; aff'd 81 N. Y. 379	23, 24
Chapin v. Thomson	16 Hun, 53	d 347
Chappell v. Dann	1 Barb. 17	280
Chipman v. Montgomery	63 N. Y. 221	155
Christal v. Kelly	88 N. Y. 285	f 94, 98
Clare v. Lockard	19 N. Y. Civ. Pro. 157	321
Clark, *In re*	40 Hun, 233	f 85
Clark v. Dillon	97 N. Y. 378	f 334
Clark v. Fletcher	1 Allen, 53	32
Clayton v. Yarrington	16 Abb. Pr. 278	36
Coates v. Goddard	34 Super. Ct. 118	5, 9
Cogswell v. New Haven R. R. Co.	105 N. Y. 608	386
Coit v. Campbell	82 N. Y. 509	164
Collom v. Caldwell	5 How. Pr. 336	350
Colton v. Simmons	14 Hun, 75	100, 102
Combs v. Combs	25 Hun, 279, rev'g 1 N. Y. Civ. Pro. 298; s. c., 62 How. 304	42
Com. v. Davidson	1 Cush. 33	31
Conaughty v. Saratoga Co. Bank	92 N. Y. 401	f 5, 8
Cooper v. Jolly	30 Hun, 224	f 47
Corning v. Corning	6 N. Y. 104	301
Coughlin v. N. Y. Cent. R. R. Co.	77 N. Y. 385	289
Cowing v. Altman	79 N. Y. 167	132
Crairy v. Barwood	5 Abb. Pr. 219	350
Cregin v. Railroad Co	75 N. Y. 193	406
Creighton v. Ingersoll	20 Barb. 541	279
Croghan v. Livingston	17 N. Y. 218	419
Crouch v. Gridley	6 Hill. 250	405
Crouter v. Crouter	44 St. Rep. 315	419
Cunningham v. McGrady	2 Baxt. (Tenn.) 148	288
Curley v. Tomlinson	5 Daly, 283	158
Currier v. Boston R.	37 N. H. 223	289

D.

Davidsburgh v. The Knickerbocker Life Ins. Co.	90 N. Y. 526	181
Davidson v. Alfair	16 Hun, 353; s. c., 80 N. Y. 660,	289
Davis v. Bilsland	18 Wall, 659	282
Davis v. Davis	3 St. Rep. 168	nf 55
Davis v. Stanford	37 Hun, 531	154, 155, 156

Cases.	Where Reported.	Page Cited.
Day v. Bowman	10 N. East Rep. 126	281
Day v. Wilber	Colman & Cai. Cas. 381	160
Dayton v. The McElwee M'f'g Co.	N. Y. Law Journal, December 22d, 1891	108
Decker v. Parsons	11 Hun, 296	301
Delaware & H. C. Co. v. Pennsylvania C. Co.	50 N. Y. 250	147
Dimick v. Cooley	3 Civ. Pro. 140	76, 289
Dodd v. Brott	1 Minn. 270	289
Dodge & Stephenson Manufacturing Co., *In re*	77 N. Y. 101	f 15
Donovan v. Cornell	8 Civ. Pro. 283	137
Douglass v. Haberstro	83 N. Y. 611	111
Dowling v. Hudson	14 Beav. 423	442
Dox v. Dey	3 Wend. 356	301
Druckermiller v. Shoninger	15 Daly, 477	43
Duffy v. Duffy	50 Hun, 266; s. c., 19 St. Rep. 228	89
Dunkin v. Vanderbergh	1 Paige, 62	289
Dunklay v. Van Buren	3 John Ch. 330	428
Dunning v. Ocean National Bank	61 N. Y. 497	430

E.

Eagan v. Stevens	39 Hun, 311	d 175
Eberhardt v. Schuster	10 Abb. N. C. 374	289
Edington v. Ætna Ins. Co.	77 N. Y. 564	50
Edwards v. Drew	2 E. D. Smith, 55	157, d 159
Eldridge, *In re*	83 N. Y. 161	306
Elizabethport M'f'g Co. v. Campbell	13 Abb. Pr. 86	206
Elwood v. Western Union Tel. Co.	45 N. Y. 549	401
Ely v. Cook	28 N. Y. 365	283, 284
Emmerick v. Heffernan	53 N. Y. Super. 98	307
Equitable Life Ins. Soc. v. Stevens	63 N. Y. 341	428
Esmond v. Bullard	16 Hun, 65	405
Estes v. Wilcox	67 N. Y. 264	f 320
Everett v. Vendryes	19 N. Y. 438	188

F.

Fero v. Ruscoe	4 N. Y. 162	344
Field v. Ripley	20 How. Pr. 26	443
Figg v. Edwards	20 Hun, 90	206
Finch v. Gallagher	25 Abb. N. C. 404	204
Finlandson v. Lachenmeyer	37 How. 145	355
Firmenich v. Bovee	1 Hun, 232	289
First National Bank v. Bushwick	17 N. Y. Civ. Pro. 229	106, f 110

Cases.	Where Reported.	Page Cited.
First National Bank v. Tamajo	77 N. Y. 476	f 147
First National Bank of Chicago v. Renitz	24 St. Rep. 740	239
Fish v. Wing	1 Civ. Pro. 231	164
Fisher v. Dougherty	42 Hun, 167	f 46
Fisher v. Fisher	30 St. Rep. 363; s. c., 9 N. Y. Supp. 4; 55 Hun, 610 men	a 48
Fitzgerald v. Quann	33 Hun, 652; aff'd 109 N. Y. 441	302
Foot v. Stiles	57 N. Y. 399	15
Forbes v. Chichester	125 N. Y. 769	f 143, 145
Ford v. Johnston	7 Hun, 563	410
Frank v. Davis	21 N. Y. Civ. Pro. 374	r 426
Freeholders v. Bank	38 N. J. Eq. 36	238
Frist v. Climm	6 Civ. Pro. 30	q & nf 341
Frothingham v. Broadway R. R. Co.	9 Civ. Pro. 304	154
Fry v. Bennett	3 Bosw. 200	206

G.

Gardner v. Barney	24 How. Pr. 467	d & nf 292
Gedney v. Purdy	47 N. Y. 676	164
Gibbon v. Freel	65 How. Pr. R. 273	360
Giberton v. Ginochio	1 Hilt. 218	157, d 160
Gibson v. Martin	8 Paige, 481	443
Gifford v. Rising	48 Hun, 128	164
Gilbert v. Laidlaw	102 N. Y. 588	d 176
Gildersleeve v. Landon	73 N. Y. 609	401
Gilman v. Tucker	18 N. Y. Civ. Pro. 50	ap dis 143
Glenney v. Stedwell	64 N. Y. 120	154
Globe Ins. Co. v. Lansing	5 Cow. 380	428
Goldberg v. Roberts	12 Daly, 339	154
Goldberg v. Utley	60 N. Y. 427	f 21
Goodrich v. Dunbar	17 Barb. 644, 646	134
Gould v. Cayuga Bank	86 N. Y. 75	396
Grafton v. Union Ferry Co	20 N. Y. Civ. Pro. 238	a 402
Graham v. Carleton	9 N. Y. Supp. 392	306
Graham v. Reed	57 N. Y. 681	386
Greeley v. Smith	3 Story, 658	405
Greene v. Creighton	7 R. I. 1	4
Greene v. Greene	23 St. Rep. 869, 875	87, 94
Greentree v. Rosenstock	61 N. Y. 583	137
Gregory v. Cresswell	14 L. J. Ch. 300	281
Gridley v. Garrison	4 Paige 647	289
Griffith v. Griffith	9 Paige, 315	4
Gruman v. Smith	81 N. Y. 25	373

H.

Cases.	Where Reported.	Page Cited.
Hale v. Patton	60 N. Y. 233	182
Hall v. Ditson	5 Abb. N. C. 198; s. c., 55 How. Pr. 19	262
Hall v. Hall	13 Hun, 307; aff'd 81 N. Y. 130	90, 94
Hard v. Ashley	117 N. Y. 606	155
Hardy v. Peters	30 Hun, 79	347
Harland v. Howard	32 St. Rep. 872	135
Harwood v. Buffalo	14 N. Y. 540	386
Hasbrouck v. Bunce	62 N. Y. 475	197
Hasbrouck v. Manhattan R. R. Co (unreported)	f 100, 104	
Hayer v. Nourse	114 N. Y. 595	164
Hazard v. Birdsall	21 N. Y. Civ. Pro. 304	92
Heacock v. Sherman	14 Wend. 58	405
Heishon v. Knickerbocker Co	45 Super. 34	154, 155
Henderson v. Henderson	44 Hun, 422; s. c., 9 St. Rep. 856	88, 92
Henderson v. Scott	43 Hun, 22	f 55
Henry v. Henry	4 Dem. 253	213
Hepworth v. Union Ferry Co	23 N. Y. Civ. Pro. 407 note	407
Hewlett v. Wood	55 N. Y. 634; 62 N. Y. 75; 1 Hun, 88	90, 92, 93
Hibernia National Bank v. Lacombe	84 N. Y. 367	183, 188
Hicks, *In re*	14 N. Y. St. Rep. 823	310
Hill v. Duncan	110 Mass. 238	301
Hillis v. Bleckert	58 Hun, 499; s.c., 25 St. Rep. 553	135
Hobart v. Hobart	62 N. Y. 80	f 85
Holden, *In re*	126 N. Y. 589	f 297
Hollender v. Hall	18 N. Y. Civ. Pro. 394; aff'd 19 Id. 293	202
Holmes, *In re*	13 N. Y. Supp. 100	247
Holmes v. Evans	37 St. Rep. 369; s. c., 13 N. Y. Supp. 610	298
Honegger v. Wetstein	94 N. Y. 252	401
Hopkins v. Lott	111 N. Y. 579	124
Hoyt v. Hoyt	112 N. Y. 515	50
Hull of a New Ship	Davies (or 2 Ware), 199	282
Humerton v. Hay	65 N. Y. 380	292
Hurd v Beeman	8 How. Pr. 254	159
Hutchinson v. Lawrence	29 Hun, 450	156

I.

Iaege v. Bossieux	15 Grat. 83	282

J.

Cases.	Where Reported.	Page Cited.
Jenkins v. Convoy	10 Hun, 77	89, 99
Jenkins v. Putnam	106 N. Y. 272	247
Jones v. Conde	6 Johns. Ch. 77	227
Jones v. Hurst	67 Mo. 568	262

K.

Kaliski v. Pelham Park R. R. Co.	20 N. Y. Civ. Pro. 315	43
Kasson v. Mills	8 How. Pr. 377	159
Keaton v. Ulster Plank Road Co.	7 How. Pr. 41	23
Kellogg v. Schuyler	2 Denio, 73	405
Kendall v. Niebuhr	45 Super. Ct. 542; affirmed 46 Super. Ct. 544	4
Kenny v. Clarkson	1 Johns. 385	80
Kerr v. Moore	54 Miss. 286	282
Kivert v. Von Bula	1 City Ct. Reports, 243	360
Kipp v. Rapp	7 N. Y. Civ. Pro. 385	280, 289
Knapp, *In re*	85 N. Y. 284	76
Knapp v. Simon	96 N. Y. 284	132
Krause v. Averill	4 Browne's Civ. Pro. 410	318

L.

Lachmeyer v. Lachmeyer	17 Week. Dig. 310	76
Lane v. N. Y. Life Ins. Co	56 Hun, 92	114
Langworth v. Hendy	2 Dis. Ohio, 73	288
Lansing v. Hadsall	26 Hun, 619	262
Latterman v. Fere	11 N. Y. Civ. Pro. 217	43
Lawrence v. Van Horne	1 Caines, 276	80
Leacroft v. Fowler	7 How. Pr. 259	23
Lee v. Vacuum Oil Co	126 N. Y. 579	f 70
Lichtenberg v. Herdtfelder	8 N. E. Rep. 526	410
Lincoln v. Battelle	6 Wend. 475	355
Lincoln v. Linde	16 N. Y. Supp. 106; s. c., 27 Abb. N. C. 278	374
Livermore v. Bainbridge	14 Abb. Pr. N. S. 227	108
Livingston v. Manhattan Railway Co.	17 N. Y. Supp. 486	311
Loeb v. Willis	22 Hun, 509	f 385
Lounsbury v. Purdy	18 N. Y. 515	132
Lowry v. Tew	25 Hun, 257	292
Lynch v. Elevated Railroad Co.	129 N. Y. 274	426
Lynch v. Johnson	48 N. Y. 27	f 240
Lyons v. Park	111 N. Y. 350	164

M.

McCarthy v. Graham	8 Paige, 480	428
McCarthy v. Peake	9 Abb. Pr. 166	142

Cases.	Where Reported.	Page Cited.
McCulloch v. Dobson	30 N. E. Rep. 641	312
McCulloch v. Norwood	58 N. Y. 562	405, 411
McElmoyle v. Cohen	13 Peters, 312	354
McIntire v. Young	39 N. Y. Super. 291	307
McKeon v. Kearner	57 How. Pr. 349	89
McPherson v. Rollins	107 N. Y. 322	5
McQueen v. Babcock	41 Barb. 337	f 365
Magrath v. Lord Muskerry	Vern. & Scriv. 171; s. c., 1 Ridg. P. C. 476	281
Malaney v. Cronin	44 Hun, 270; s. c., 7 St. Rep. 700	87, 88, 90
Man v. Fairchild	2 Keyes, 106	386
Manby v. Bothell	11 Abb. N. C. 128	154
Mangan v. Peck	111 N. Y. 401	302
Manhattan Sav. Inst. *In re*	82 N. Y. 142	f 297
Mann v. Baker	12 How. Pr. 521	206
Manning v. Moore	18 N. Y. Civ. Pro. 349	288
Mark v. City of Buffalo	87 N. Y. 184,	f 100, 102, 103, 105, 146, 147
Markham v. Jauden	41 N. Y. 235	373
Marshall v. Meech	51 N. Y. 143	76, 289
Martin v. Hawkes	15 Johns. 405	289
Martin v. Walker	12 Hun, 46	410
Marvin v. Marvin	11 Abb. Pr. N. S. 102	88, 92, 93
Matthews v. Tufts	87 N. Y. 570	202
Maxwell v. East River Bank	3 Bosw. 124	4
May v. Bank	2 Rob. (Va.). 56	405
Mayor v. Second Av. Ry	102 N. Y. 572	258, 266
Meltzer v. Doll	91 N. Y. 365	66
Merchant v. Sessions	5 N. Y. Civ. Pro. 24	280
Miller v. Benham	68 N. Y. 83	355
Miller v. Kent	10 Week. Dig. 361; s. c., 59 How. Pr. 321	108, 154
Miller v Scherder	2 N. Y. 262	142
Mills v. Mills	115 N. Y. 80	320
Miner v. Beekman	50 N. Y. 343	f 375
Moffatt v. Fulton	56 Hun, 357; s. c., 31 St. Rep. 154	135
Moore v. Appleby	108 N. Y. 237	9
Moores v. Townsend	102 N. Y. 387	387
Morgan v. Filmore	18 Abb. Pr. 217	115
Moses v. Murgatroyd	1 John. Ch. 119	430
Munn v. Barnum	12 Abb. Pr. 563	314
Munro v. Smith	17 N. Y. Civ. Pro. 158	d 5, 9
Murphy v. Adams	71 Me. 113	282

N.

Cases.	Where Reported.	Page Cited.
Nassau Bank v. Yandes	44 Hun, 55	170
Nat'l Tradesmen's Bank v. Wetmore	124 N. Y. 248; s. c., 26 N. E. Rep. 548	f 320
Nat. Ex. Bank v. Silliman	4 Abb. N. C. 224	164
Naylor v. Lane	5 N. Y. Civ. Pro. 150	76, 288
Nellis v. De Forest	6 How. Pr. 413	350
Newell Universal Mill Co. v. Muxlow	17 N. Y. Civ. Pro. 288	f 46
Newhall v. Appleton	4 Law Bul. 5	105
Nicoll v. Nicoll	16 Wend. 446	285, 287, 289
Noonan v. Lee	2 Black. 499	428
Nordlinger v. De Mier	18 N. Y. Civ. Pro. 47	f 368
Nugent v. Keenan	53 Supr. Ct. R. 590	105

O.

Oliver v. Heyward Chair Mfg Co.	10 N. Y. Supp. 771; s. c., 32 St. Rep. 542	337
Olney v. Hatcliff	37 Hun, 286	156
Orchard v. Hughes	1 Wall. 73	428
Osborn v. McCloskey	55 How. Pr. 345	111

P.

Pach v. Gilbert	18 N. Y. Civ. Pro. 262	241
Pach v. Gilbert	20 N. Y. Civ. Pro. 300	f 94, 99
Pach v. Orr	112 N. Y. 670	98
Palmer v. Ensign	19 Alb. Law J. 399	f 321
Parker v. Lithgoe	13 N. Y. Supp. 949	d 35
Pate v. Hoffman	40 St. R. 915; s. c., 16 N. Y. Supp. 74	373, 374
Patterson v. McCunn	46 How. Pr. 182	92
Payn v. Grant	23 Hun, 134	262
Pease v. Gleason	8 Johns. 409	160
Penniman v. Fuller & Warren Co.	62 Hun, 473	r 205
People v. Ames	35 N. Y. 482	98
People v. Common Pleas	18 Wend. 652	163, 285
People *ex rel.* Cooper v. Field	52 Barb. 198	278
People *ex rel.* McNeary v. McLean (unreported)		nf 116, 117
People v. Manning	13 Wend. 649	287
People v. Mayor	63 N. Y. 291	15
People v. Railroad Co.	7 Abb. Pr. N. S. 290	f 442
People v. Railroad Co.	5 Lans. 25	5
People *ex rel.* Miller v. Ryder	20 N. Y. Civ. Pro. 172	390
People *ex rel.* Miller v. Ryder	58 Hun, 407; s. c., 34 St. Rep. 322; 12 N. Y. Supp. 48	390
People v. Schuyler	106 N. Y. 304	50

Cases.	Where Reported.	Page Cited.
People v. Smith	24 Barb. 16	273
People v. Wheeler	21 N. Y. 82	15
People *ex rel.* Decker v. Whitney	1 T. & C. 533	273
Perkins v. Coddington	4 Robt. 647	4
Perry v. Chester	53 N. Y. 240	284
Person v. Grier	66 N. Y. 126	204
Peters v. Delaplaine	49 N. Y. 362	386
Pharis v. Gire	31 Hun, 443	301
Phelps v. Phelps	6 Browne's Civ. Pro. 120; aff'd 32 Hun, 642	318
Place v. Hayward	8 Civ. Pro. 353	76
Place v. Hayward	117 N. Y. 487	f 144
Place v. Riley	98 N. Y. 1	111
Platt v. Platt	15 N. Y. St. Rep. 217	247
Plimpton v. Bigelow	93 N. Y. 592	182
Pollock v. Webster	16 Hun, 104	302
Power v. Hathaway	43 Barb. 214	355
Protestant Episcopal Public School, *In re*	86 N. Y. 396	f 297
Prouty v. Swift	10 Hun, 232	288
Purdy v. Sistare	2 Hun, 126	f 375

Q.

Quinn v. Lloyd	31 N. Y. Super. 253	307

R.

Randall v. Chesapeake Co.	1 Har. 284	32
Ratel v. Ratel	17 Week. Dig. 187	318
Raymond v. Brooks	39 How. Pr. 388	154, 155
Reddington v. Mariposa L. & M. Co.	19 Hun, 405	f 435
Redfield v. Florence	2 E. D. Smith, 339	157, d 160
Rensselaer & Sar. R. R. Co. v. Davis.	55 N. Y. 147	f 296
Republic of Mexico v. De Arangoiz.	5 Duer, 640	134
Rice v. Gernhart	35 Wis. 232	289
Riggs v. Cragg	89 N. Y. 479	58
Roberts v. Carter	38 N. Y. 107	283
Roberts v. Berdell	15 Abb. Pr. N. S. 183	f 375
Roberts v. Sikes	30 Barb. 178	nf & o 374
Robinson v. Oceanic Steam Navigation Co.	16 N. Y. Civ. Pro. 255	f 181
Robinson v. Plimpton	25 N. Y. 484	d & nf 292
Rogers v. Omaha Hotel Co.	4 Neb. 54	289
Rooney v. Second Avenue R. R. Co.	18 N. Y. 360	76, 283, 288
Ruger v. Fayhs Watch Co	20 N. Y. Civ. Pro. 204	43
Ruggles v. Keeler	3 Johns. 263	355
Rumrill v. Huntington	5 Day (Conn.), 163	289

Cases.	Where Reported.	Page Cited.
Russell v. Randell	123 N. Y. 436	208
Rust v. Hauselt	2 N. Y. Month. L. Bul. 6	104

S.

Salter v. Parkhurst	2 Daly, 240	43
Sander v. Harris	20 N. Y. Civ. Pro. 258	203
Sandford v. Sandford	62 N. Y. 553	f 365
Sandford v. Sinclair	8 Paige, 374	443
Sands v. Calkin	30 How. Pr. 1	206
Sayer v. Kitchen	1 Esp. 209	31
Seaman v. Whitehead	78 N. Y. 308	57
Sebley v. Nichols	32 How. Pr. 182	104
Seeley v. N. Y. Exchange Nat. Bank	8 Daly, 402; aff'd 78 N. Y. 608.	386
Segelken v. Meyer	94 N. Y. 473–484	137, 141
Seneca County Bk. v. Garlinghouse	4 How. Pr. 174	206
Schermerhorn v. Van Alen	13 How. Pr. 82	24
Schneider v. Leitzman	19 N.Y. Civ. Pro. 217	270, 273, 275
Schwartz v. Jenney	20 Barb. 541	279
Scudder v. Union Nat. Bank	1 Otto, 406	355
Sharley v. Bellows	4 N. H. 347	289
Sheehan v. Bradford, Dordell & Kinzua R. R. Co	15 N. Y. Civ. Pro. 429	f 202, nf 204
Sherry v. Cafy	111 N. Y. 514	d 192
Shumway v. Shumway	1 Lans. 474; s. c., 42 N. Y. 143	87
Sibley v. County of Pine	31 Minn. 201; s. c., 17 N. W. Rep. 337	281
Sibley v. Equitable, etc., Co	56 Super. Ct. 274; s. c., 18 St. Rep. 834; 3 N. Y. Supp. 8.	115
Siewert v. Hamel	33 Hun, 44	428
Skinner v. Powers	1 Wend. 451	344
Skyrme v. Occidental Mill & Min. Co	8 Nev. 219	282
Smith v. Crouse	24 Barb. 433	d & nf 292
Smith v. Lowry	1 Johns. Ch. 320	307
Smith v. Nelson	62 N. Y. 288	307
Smith v. Smith	25 Wend. 405	182
Southern Boulevard, *In re*	3 Abb. Pr. N. S. 477	15
Sprague v. Jones	9 Paige, 395	428
Starin v. Kelly	47 N. Y. Super. 291	307
Stearns v. Marsh	1 Denio, 230	373
Sternberger v. McGovern	56 N. Y. 12	386
Stevens v. Mayor	84 N. Y. 296	386
Stevens v N. Y. Elevated R. R. Co.	18 N. Y. Civ. Pro. 350	100, 104
Stewart, Estate of	8 Civ. Pro. 356	240
Stewart v. Hilton	19 Blatch. U. S. 290	288
Story v. Bishop	4 E. D. Smith, 423	157, d 159

Cases.	Where Reported.	Page Cited.
Sturges v. Vanderbilt	73 N. Y. 384	405
Sullivan v. Remington S. M. Co.	27 Hun, 276; s. c., 2 Civ. Pro. 68	162
Swift v. Collins	1 Den. 659	183

T.

Talbot v. Doran & Wright Co.	30 St. Rep. 559; s. c., 18 Civ. Pro. 304; 9 N. Y. Supp. 478.	154
Tallmadge v. East River Bank	2 Duer, 614; aff'd 26 N. Y. 105.	3, 4
Terney v. Wilson	16 Vt. 282	289
Thompson v. Halbert	109 N. Y. 329	344
Tim v. Smith	3 Civ. Pro. 347; aff'd 93 N. Y. 87	108, 228, f 229
Tolman v. S. B. & N. Y. R. R. Co.	92 N. Y. 353	164
Toronto General Trust Co. v. Chicago, B. & Q. R. R. Co.	32 Hun, 190	183
Townsend v. Tolhurst	10 N. Y. Supp. 378	247
Tunstall v. Winton	31 Hun, 220; s. c., 92 N. Y. 646	76
Turno v. Parks	2 How. Pr. N. S. 35	288
Tuttle v. Howe	14 Minn. 113	282

U.

Uhlenhaul v. Railway Co.	18 N. Y. Supp. 797	311

V.

Van Valkenburgh v. Van Schaick	8 How. Pr. 271	350
Van Schuyler v. Mulford	59 N. Y. 426-430	89
Varnum v. Wheeler	9 N. Y. Civ. Pro. 421	100, 101
Veeder v. Baker	83 N. Y. 156	207
Velie v. Newark City Ins. Co.	3 N. Y. Civ. Pro. 202	91
Verplanck v. Insurance Co.	2 Paige, 450	442, 443
Vidette v. Dudley	24 St. Rep. 20	154
Vilas v. Chase	19 N. Y. Civ. Pro. 333	f 368
Village of Palmyra v. Wynkoop	17 N. Y. Civ. Pro. 187.	f 424
Voessing v. Voessing	12 Hun, 678	92
Vosburgh v. Thayer	12 Johns. 461	33

W.

Wager v. Wager	23 Hun, 439	89, 91, 93
Waltermire v. Westover	14 N. Y. 16	247
Ward v. Craig	87 N. Y. 549	280
Ward v. Roy	69 N. Y. 96	395
Ward v. Ward	23 Hun, 431	87, 89, 91, 93
Warner v. Western Transportation Co.	5 Robt. 499	298
Waterman v. Waterman	37 How. Pr. 36	23
Wavel v. Wiles	24 N. Y. 635, 637	159

Cases.	Where Reported.	Page Cited.
Weaver v. Ely	88 N. Y. 89	f 8
Weed, The Sarah J.	2 Lowell, 555	282
Wehle v. Conner	88 N. Y. 231	70
Western v. Railway Co.	42 N. Y. Super. 102	307
Wight v. McClave	3 E. D. Smith, 316	157, d 159
Wiles v. Suydam	64 N. Y. 173	f 21
Wilkins v. Batterman	4 Barb. 47	289
Williams v. Cullen	11 St. Rep. 283	108
Williams v. Ingersoll	89 N. Y. 518	288
Williams v. Waddell	5 Civ. Pro. 191	108
Wilton v. Wentworth	5 Foster, N. H. 247	77
Winslow v. Transit Co.	4 N. Y. Supp. 169	436
Withers v. Gillespy	7 Ser. & Raw. 10	31
Witthaus v. Schack	105 N. Y. 336	118
Wolfe v. Brouwer	5 Robt. 601	134
Wood v. Henry	40 N. Y. 124	137
Wood v. Lary	124 N. Y. 83	f 144
Worthington v. Dorsett	6 N. Y. St. Rep. 861 revs'g, s. c., Daily Reg., Oct. 1886.	f 110
Wright v. Keenan	52 N. Y. Super. 530	100, 102
Wright v. Wright	70 N. Y. 96	289

Z.

Zogbaum v. Parker	66 Barb. 341	283, 289

STATUTES, ETC., CITED.

SECTIONS OF THE CODE OF CIVIL PROCEDURE.

Section.	Page.
3	188
7	189
23	107
46	14
66	69, 276, 277
111	189
242	97
264	189
292	240
294	240
315	189
318	296
335	292
341	189
356	291, 292, 293, 294
390	355
399	320, 321
406	361
413	117
416	359
421	360
427	172
431	434
432	205, 434, 435, 439
461	133, 136
488	26
494	344
501	141
519	334
528	341, 342, 343
529	340, 341, 342, 343
546	26
549	131, 132
549, subd. 2	130, 137, 138
550	137, 138
551	138
558	138
561	109
572	139
583	109
586	175, 179
592	175
604	223
641	107
682	229
712	97
723	302
757	162, 164, 321
820	170
834	250
841	391
872	346
887	211, 212, 213
888	211, 212, 213
900	185
968	54
977	124
1010	422
1011	24
1021	423
1022	144
1023	310, 311

Section.	Page.
1204	262, 263
1251	244
1279	352
1880	243, 245, 246
1381	246
1405	324
1412	324
1500	198
1511	26
1522	198
1523	198
1537	83, 87, 88
1544	54
1579	369
1580	369
1582	390
1627	488
1779	180
1780	181, 182, 337
1881	437
1991–2148	76
2007	76, 77, 78
2183	116
2285	271
2320–2340	119
2321	119
2348	120
2441	236, 240
2446	174, 240
2447	240
2448	240
2449	240
2559	352
2581	378, 379
2624	56
2717	73, 74
2863	191
2863, subd. 2	232
2879	434
2900	352, 353
2951	333
2952	333
2954	232, 234
2956	231, 232, 233, 234
3050	291, 293, 294
3057	158
3165	359, 360
3165–3176	360
3169	189, 315
3170	188
3191	432
3228	54, 191
3228, subd. 1	54
3228–3279	42
3229	191
3230	54
3240	269
3253	7
3258, subd. 2	5
3271	164
3296	148
3343	66
3343, subd. 14	180
3343, subd. 18	189
3347, subd. 4	42
3347, subd. 13	42
Chap. 16, tit. 2 (§§ 1991–2148)	76
Chap. 17, tit. 6, Art. 4 (§§ 2320–2340)	119
Chap. 20, tit. 1, Art. 2 (§§ 3165–3176)	360
Chap. 21, tit. 1, 2, 3 (§§ 3228–3279)	42

SECTIONS OF THE CODE OF PROCEDURE CITED.

Section.	Page.
116, subd. 2	417
134	417

SESSION LAWS CITED.

Page.

Laws of 1832, chap. 295.....410
" 1832, " 295, § 4.....408, 412
" 1837, " 460, § 77.....211
" 1848, " 40, § 2.....388
" 1848, " 319.....381, 388
" 1853, " 135.....408
" 1853, " 238, § 2.....93
" 1853, " 288.....83
" 1854, " 50.....282
" 1854, " 270, § 3.....296
" 1867, " 937.....408
" 1870, " 359.....58
" 1880, " 245.....87, 408, 410
" 1880, " 245, § 1.....211
" 1880, " 245, § 10.....412
" 1880, " 269.....295, 296
" 1886, " 672, § 549.....187, 188
" 1886, " 672.....182, 189
" 1888, " 536, tit. 6, §§ 5, 6, 7.....13, 14
" 1890, " 51.....301
" 1890, " 248.....301
" 1891, " 364.....390
" 1891, " 365.....390

NEW YORK REVISED STATUTES CITED.

First Edition.

1 R. S. 600, § 8.....402
1 R. S. 600, § 9.....408, 405, 408, 412
1 R. S. 600, § 10.....405, 408
2 R. S. 191, §§ 151, 154.....428
2 R. S. 619.....163

Fifth Edition.

3 R. S. 746, §§ 1, 2.....413

Seventh Edition.

3 R. S. 2374, § 59.....176
3 R. S. 2394, 2395, §§ 1, 2.....404

GENERAL RULES OF PRACTICE CITED.

Rule 2 of 1847.....168

TEXT-BOOKS, ETC., CITED.

21 Am. L. Rev. 79.....268
Bailey's New Tr. & App. 255, 524, 525.....307, 308
1 Bosw. Law Dic. 214, subd. 3.....147
Coak's Littleton, 43.....147
Cowen's Treat. & Pr. §§ 1219, 1220.....161
3 Graham & Wat. New Tr. § 1026.....307
3 Greenleaf on Evidence, § 390.....85
Jones on Liens, §§ 222, 223.....289
Jones on Liens, § 226.....281
Jones on Liens, § 992.....281
4 Kent Com. (13th ed.) 188 *.....374
Kneeland on Mech. Liens, § 7.....282
5 Lawson's Rights, Rem. & Prac. 41, 42.....182
McAdam's Landlord & Tenant, 45.....273
Phillip's on Mech. Liens, § 85.....282
2 Pomeroy's Eq. Jurisp. 16, 17, 92.....5
2 Rumsey's Pr. 342, 383.....54
Sedgwick on Stat. Const. (2d ed.) 287.....78
Stokes on Liens of Attorneys, 14.....281
1 Story's Eq. Juris. § 346 *et seq*.....54
Townshend on Lib. & Slander (3d ed.), § 212.....344
Weeks on Attorneys, 407, § 237.....4
2 Wharton on Cont. § 873.....182

SECTIONS OF THE CODE OF CIVIL PROCEDURE

CONSTRUED OR CITED IN THE FOLLOWING REPORTS, ISSUED DURING THE PERIOD COVERED BY THIS VOLUME: New York Reports, Vols. 129, 130, 131, 132, 133; Hun's Reports, Vols. 62, 63, 64; Daly's Reports, Vol. 16; and New York Civil Procedure Reports, Vol. 22.

Title 1, chap. 8 People *ex rel.* N. Y. C. & H. R. R. R. Co. *v.* Cook.....62 Hun, 303.
14, subd. 4 Lawrence *v.* Harrington.....63 Hun, 195.
23 Macdonald *v.* Kieferdorf.....22 N. Y. Civ. Pro. 105.

46 *In re* City of Middletown.....22 N. Y. Civ. Pro. 12.
46 Matter of Ogden Street.....63 Hun, 188
66 Poole *v.* Belcha.....22 N. Y. Civ. Pro. 67.
66 Marvin *v.* Marvin.....22 N. Y. Civ. Pro. 274.
66 Poole *v.* Belcha.....131 N. Y. 200.
116, subd. 2 Hopkins *v.* Frey.....64 Hun, 213.
134, subd. 2 Hopkins *v.* Frey.....64 Hun, 213.
194 Bossout *v.* Rome, Watertown & O. R. R..131 N. Y. 37.
315 Globe Yarn Mills *v.* Bilbrough.....22 N. Y. Civ. Pro. 186.
319 Hawes *v.* Judd.....16 Daly, 111.
323 Frost *v.* Craig.....16 Daly, 110.
340, subd. 1 Hawley *v.* Whalen.....64 Hun, 550.
343 Hawes *v.* Judd.....16 Daly, 111.
369 Kneller *v.* Lang.....63 Hun, 48.
382 Bowman *v.* Hoffman.....22 N. Y. Civ. Pro. 371.
382, subd. 5 Higgins *v.* Crouse.....63 Hun, 134.
388 Bowman *v.* Hoffman.....22 N. Y. Civ. Pro. 371
388 Mortimer *v.* Chambers.....63 Hun, 335.
388 *In re* Duffy.....133 N. Y. 512.
390 Beer *v.* Simpson.....22 N. Y. Civ. Pro. 351.
395 Cudd *v.* Jones.....63 Hun, 142.
399 Riley *v.* Riley.....22 N. Y. Civ. Pro. 318.
399 Riley *v.* Riley.....64 Hun, 496.
403 Hull *v.* Brennan.....64 Hun, 394.
406 Best *v.* Davis Sewing Machine Co.....22 N. Y. Civ. Pro. 362.
406 Wilder *v.* Ballou.....63 Hun, 118.
406 Hall *v.* Brennan.....64 Hun, 394.
410 Bowman *v.* Hoffman.....23 N. Y. Civ. Pro. 371.
410 Bogardus *v.* Young.....64 Hun, 398.
414 *In re* Duffy.....133 N. Y. 512.
414 Better *v.* Prudential Insurance Co.....16 Daly, 345.
416 Van Clief *v.* Van Vechten.....130 N. Y. 571.
418 Van Clief *v.* Van Vechten.....130 N. Y. 571.
421 Bell *v.* Good.....22 N. Y. Civ. Pro. 356.
421 McKenna *v.* Duffy.....22 N. Y. Civ. Pro. 366.
423 Bell *v.* Good.....22 N. Y. Civ. Pro. 317.
424 Bell *v.* Good.....22 N. Y. Civ. Pro. 317, 356.
424 McKenna *v.* Duffy.....22 N. Y. Civ. Pro. 366.
427 Feldman *v.* Grand Lodge.....22 N. Y. Civ. Pro. 165.
431 Jepson *v.* Postal Telegraph Cable Co....22 N. Y. Civ. Pro. 433.
432 Marks *v.* La Société Anonyme de l' Union des Papeteries.....22 N. Y. Civ. Pro. 201.
432. Glines *v.* Order of Iron Hall.....22 N. Y. Civ. Pro. 436.
439 Crouter *v.* Crouter.....133 N. Y. 55.
440 *In re* Field.....131 N. Y. 184.
440 Regan *v.* Traube.....16 Daly, 153.
441 Crouter *v.* Crouter.....133 N. Y. 55.
445 Haebler *v.* Myers.....132 N. Y. 363.

446 Hopkins *v.* Frey.....22 N. Y. Civ. Pro. 415.
449 Madison Square Bank *v.* Pierce .....62 Hun, 498.
449 Duncan *v.* China Mutual Insurance Co.129 N. Y. 237.
458 Hopkins *v.* Frey.....22 N. Y. Civ. Pro. 415.
471 Crouter *v.* Crouter.....133 N. Y. 55.
481 Thomas *v.* N. Y. & Greenwood Lake Railway Co.....22 N. Y. Civ. Pro. 336.
483 Lamming *v.* Galusha.....22 N. Y. Civ. Pro. 16.
484 Lamming *v.* Galusha.....22 N. Y. Civ. Pro. 16.
484 Clason *v.* Baldwin.....129 N. Y. 183.
484 Whittemore *v.* Judd Linseed Oil Co....16 Daly, 299.
484, subd. 9 American Nat'l Bank *v.* Grace.64 Hun, 22.
488 Rowland *v.* Miller.....22 N. Y. Civ. Pro. 25.
488 Duncan *v.* China Mutual Insurance Co.129 N. Y. 237.
492–495 Myers *v.* Met. El. R. Co.....16 Daly, 411.
494 Sawyer *v.* Bennett.....22 N. Y. Civ. Pro. 343.
497 Thompson *v.* Stanley.....22 N. Y. Civ. Pro. 343.
498 Duncan *v.* China Mutual Insurance Co..129 N. Y. 237.
499 Duncan *v.* China Mutual Insurance Co..129 N. Y. 237.
499 Annstein *v.* Haulenbeck.....16 Daly, 384.
501 Rothschild *v.* Whitman.....132 N. Y. 472.
508 Sawyer *v.* Bennett.....22 N. Y. Civ. Pro. 343.
508 Bissell *v.* Press Publishing Co.....62 Hun, 551.
511 Cronin *v.* Tebo.....63 Hun, 190.
514 Springer *v.* Bien.....16 Daly, 275.
519 Thomas *v.* N. Y. & Greenwood Lake Railway Co.....22 N. Y. Civ. Pro. 336.
521 Ostrander *v.* Hart.....130 N. Y. 406.
523 Beckley *v.* Chamberlain.....22 N. Y. Civ. Pro. 333.
523 Rogers *v.* Decker.....63 Hun, 15.
523 Rogers *v.* Decker.....131 N. Y. 490.
525 *In re* St. Lawrence & Ad. Railway Co..133 N. Y. 270.
529 Beckley *v.* Chamberlain.....22 N. Y. Civ. Pro. 333.
531 Rowland *v.* Miller.....22 N. Y. Civ. Pro. 25.
531 Mellens *v.* Mellens.....22 N. Y. Civ. Pro. 39.
539 Bowen *v.* Sweeney.....22 N. Y. Civ. Pro. 79.
540 Bowen *v.* Sweeney.....22 N. Y. Civ. Pro. 79.
544 Myers *v.* Met. Ele. R. Co.....16 Daly, 411.
545 Higgins *v.* Hoppock.....22 N. Y. Civ. Pro. 313.
546 Rowland *v.* Miller.....22 N. Y. Civ. Pro. 25.
549 Moffatt *v.* Fulton.....22 N. Y. Civ. Pro. 136.
549 Moffatt *v.* Fulton.....133 N. Y. 507.
604 Campbell *v.* Ernest.....22 N. Y. Civ. Pro. 218.
604 Campbell *v.* Ernest.....64 Hun, 188.
605 People *ex rel. v.* Rice.....129 N. Y. 461.
606 Addinger *v.* Pugh.....132 N. Y. 403
635 *et seq.* Gwalter *v.* N. Y. Seal Plush & Tapestry Co.....22 N. Y Civ. Pro. 315.

685 *et seq.* Adler *v.* Order of Fraternal Circle of Baltimore City.....22 N. Y. Civ. Pro. 336.
685 *et seq.* Dietlin *v.* Eagan.....22 N. Y. Civ. Pro. 398.
688 Delmel *v.* Scheveland.....16 Daly, 88.
641 Macdonald *v.* Kieferdorf.....22 N. Y. Civ. Pro. 105.
641 Diutruff *v.* Tuthill.....63 Hun, 591.
645 Higgins *v.* McConnell.....130 N. Y. 482.
649, subd. 8 Backus *v.* Kimball.....62 Hun, 122.
649, subd. 8 Hayden *v.* National Bank....130 N. Y. 146.
651 Backus *v.* Kimball.....62 Hun, 122.
682 Dayton *v.* McElwee Manufacturing Co.22 N. Y. Civ. Pro. 227.
712 Tuck *v.* Manning.....22 N. Y. Civ. Pro. 94.
721 Tuck *v.* Manning.....22 N. Y. Civ. Pro. 94.
722 Tuck *v.* Manning.....22 N. Y. Civ. Pro. 94.
723 Tuck *v.* Manning.....22 N. Y. Civ. Pro. 94.
723 Bradley *v.* Shafer.....22 N. Y. Civ. Pro. 299.
723 Delmel *v.* Scheveland.....16 Daly, 88.
723 Cumber *v.* Schoenfield.....16 Daly, 455.
724 Tuck *v.* Manning.....22 N. Y. Civ. Pro. 94.
725 Tuck *v.* Manning.....22 N. Y. Civ. Pro. 94.
755 *et seq.* Grofton *v.* Union Ferry Co. of Brooklyn.....22 N. Y. Civ. Pro. 402.
756 McGean *v.* Metropolitan El. Railway Co.....133 N. Y. 9.
757 Knoch *v.* Funke.....22 N. Y. Civ. Pro. 161.
757 Riley *v.* Riley.....64 Hun, 496.
758 Baskin *v.* Huntington.....130 N. Y. 313.
797, subd. 1 Seifert *v.* Caverly.....63 Hun, 604.
803 Fromme *v.* Lisner.....63 Hun, 290.
803 *et seq.* Fromme *v.* Listler.....22 N. Y. Civ. Pro. 87.
820 Dodge *v.* Lawson.....22 N. Y. Civ. Pro. 112.
820 Feldman *v.* Grand Lodge.....22 N. Y. Civ. Pro. 165.
820 Mars *v.* Albany Savings Bank.....64 Hun, 424.
828 Sallode *v.* Gerlach.....132 N. Y. 548.
829 Bowen *v.* Sweeney.....22 N. Y. Civ. Pro. 79.
829 Mortimer *v.* Chambers.....63 Hun, 335.
829 Hall *v.* Roberts.....63 Hun, 473.
829 McMurray *v.* McMurray.....63 Hun, 183.
829 Davis *v.* Seaman.....64 Hun, 572.
829 Godine *v.* Kidd.....64 Hun, 585.
829 *In re* Lasak.....131 N. Y. 624.
829 Luetchford *v.* Lord.....132 N. Y. 465.
829 Byron *v.* Bell.....16 Daly, 202.
830 Koehler *v.* Scheider.....16 Daly, 236.
831 Dickenson *v.* Dickenson.....63 Hun, 516.
831 Warner *v.* Press Publishing Co.....132 N. Y. 181.
834 Fisher *v.* Fisher.....22 N. Y. Civ. Pro. 48.

884 Patten *v.* United Life and Accident Insurance Co.....22 N. Y. Civ. Pro. 247.
884 Fisher *v.* Fisher.....129 N. Y. 654.
884 Patten *v.* United Life and Accident Insurance Co.....133 N. Y. 450.
885 Wadd *v.* Hazleton.....62 Hun, 602.
885 Brennan *v.* Hall.....131 N. Y. 160.
887 Rosseau *v.* Bleau.....131 N. Y. 177.
887 Rogers *v.* Decker.....131 N. Y. 490.
841 People *v.* Rider.....22 N. Y. Civ. Pro. 388.
843 *In re* People *ex rel. v.* Board of Commissioners.....129 N. Y. 360.
870 *et seq.* Douglass *v.* Meyer.....22 N. Y. Civ. Pro. 345.
870 *et seq.* Fatman *v.* Fatman.....22 N. Y. Civ. Pro. 149.
870 *et seq.* Smith *v.* Rentz.....22 N. Y. Civ. Pro. 27.
872 Talbot *v.* Doran & Wright Co.....16 Daly, 176.
873 Talbot *v.* Doran & Wright Co.....16 Daly, 176.
887 *In re* Plumb.....22 N. Y. Civ. Pro. 209.
887 Matter of Plumb.....64 Hun, 317.
887 *et seq.* Kaempfer *v.* Gorman.....22 N. Y. Civ. Pro. 34.
888 *In re* Plumb.....22 N. Y. Civ. Pro. 209.
888 Matter of Plumb.....64 Hun, 317.
889 Howes *v.* Judd.....16 Daly, 112.
900 Grissen *v.* Southworth.....22 N. Y. Civ. Pro. 184.
910 Michel *v.* Colegrove.....22 N. Y. Civ. Pro. 297, 304.
933 Donohue *v.* Whitney.....133 N. Y. 178.
942 Geoghegan *v.* Atlas S. S. Co.....16 Daly, 230.
968 Weston *v.* Stoddard.....22 N. Y. Civ. Pro. 51.
970 Lynch *v.* Metropolitan El. Railway Co.129 N. Y. 274.
970 Shepard *v.* Manhattan Railway Co....131 N. Y. 215.
977 Gowing *v.* Levy.....22 N. Y. Civ. Pro. 10.
984 Penniman *v.* Fuller & Warren Co.....22 N. Y. Civ. Pro. 205.
984 Penniman *v.* Fuller & Warren Co.....62 Hun, 473.
985 Penniman *v.* Fuller & Warren Co.....62 Hun, 473.
986 Penniman *v.* Fuller & Warren Co.....62 Hun, 473.
986 Penniman *v.* Fuller & Warren Co.....133 N. Y. 442.
992 Welsh *v.* N. Y. El. R. Co.....16 Daly, 515.
993 Van Bokkelen *v.* Berdell.....130 N. Y. 141.
993 Ostrander *v.* Hart.....130 N. Y. 406.
993 Young *v.* Young.....133 N. Y. 626.
997 Young *v.* Young.....133 N. Y. 626.
999 Beatty *v.* Thilemann.....16 Daly, 23.
1002 Michel *v.* Colegrove.....22 N. Y. Civ. Pro. 297, 304.
1003 Gleason *v.* Hamilton.....64 Hun, 96.
1005 Haebler *v.* Myers.....132 N. Y. 363.
1010 Thompson *v.* Stanley.....22 N. Y. Civ. Pro. 420.

1011 Lennon *v.* Smith.....22 N. Y. Civ. Pro. 22.
1013 Thompson *v.* Stanley.....22 N. Y. Civ. Pro. 420.
1013 Drexel *v.* Pease.....129 N. Y. 96.
1013 Randall *v.* Sherman.....131 N. Y. 669.
1019 O'Neil *v.* Howe.....16 Daly, 186.
1021 Quereau *v.* Brown.....63 Hun, 175.
1022 Gilman *v.* Prentiss.....22 N. Y. Civ. Pro. 143.
1023 Gilman *v.* Prentiss.....133 N. Y. 483.
1023 Hunter *v.* Manhattan Railway Co.....22 N. Y. Civ. Pro. 309.
1023 Thompson *v.* Stanley.....22 N. Y. Civ. Pro. 420.
1023 McCulloch *v.* Dobson.....133 N. Y. 114.
1023 Welsh *v.* N. Y. El. R. Co.....16 Daly, 515.
1204 Powers *v.* Savin.....22 N. Y. Civ. Pro. 253.
1204 Powers *v.* Savin.....64 Hun, 560.
1216 Haebler *v.* Myers.....133 N. Y. 363.
1227 Martin *v.* Platt.....131 N. Y. 641.
1251 *In re* Holmes.....131 N. Y. 80.
1251 Floyd *v.* Clark.....16 Daly, 528, 529.
1252 Floyd *v.* Clark.....16 Daly, 528, 529.
1255 *In re* Holmes.....131 N. Y. 80.
1256 Wronkow *v.* Oakley.....133 N. Y. 505.
1279 People *v.* Fitchburg Railroad Co.....133 N. Y. 239.
1292 Haebler *v.* Myers.....133 N. Y. 363.
1306 Lane *v.* Humbert.....16 Daly, 187.
1306 Bonnett *v.* Townsend.....63 Hun. 45.
1323 Haebler *v.* Myers.....133 N. Y. 363.
1326 Lane *v.* Humbert.....16 Daly, 187.
1331 Chester *v.* Broderick.....131 N. Y. 549
1337 Bossont *v.* Rome, Watertown & O. R. R..131 N. Y. 87.
1337 Kingsland *v.* Murray.....133 N. Y. 170.
1339 People *v.* Featherly.....131 N. Y. 597.
1344 Levy *v.* Coogan.....16 Daly, 138.
1346 Levy *v.* Coogan.....16 Daly, 138.
1379 Baskin *v.* Huntington.....130 N. Y. 313.
1380 *In re* Matteson.....22 N. Y. Civ. Pro. 241.
1380 Baskin *v.* Huntington.....130 N. Y. 313.
1380 *In re* Holmes.....131 N. Y. 80.
1391 Baskin *v.* Huntington.....130 N. Y. 313.
1405 Sickles *v.* Sullivan.....22 N. Y. Civ. Pro. 323.
1421 Dyett *v.* Hyman.....129 N. Y. 351.
1422 Dyett *v.* Hyman.....129 N. Y. 351.
1423 Dyett *v.* Hyman.....129 N. Y. 351.
1496 Clason *v.* Baldwin.....129 N. Y. 183.
1497 Clason *v.* Baldwin.....129 N. Y. 183.
1500 Read *v.* Simon.....22 N. Y. Civ. Pro. 196.
1503 Clason *v.* Baldwin.....129 N. Y. 183.
1511 Rowland *v.* Miller.....22 N. Y. Civ. Pro. 25.
1522 Read *v.* Simon.....22 N. Y. Civ. Pro. 196.

1528 Read v. Simon.....22 N. Y. Civ. Pro. 196.
1525 Wing v. De La Rionda.....131 N. Y. 422.
1532 Jones v. Fey.....129 N. Y. 17.
1536 Crouter v. Crouter.....133 N. Y. 55.
1537 Bowen v. Sweeney.....22 N. Y. Civ. Pro. 79.
1579 McKenna v. Duffy.....22 N. Y. Civ. Pro. 366.
1580 McKenna v. Duffy.....22 N. Y. Civ. Pro. 366.
1592 People v. Rider.....22 N. Y. Civ. Pro. 388.
1626 *et seq.* Dudley v. Third Order of St. Francis.....22 N. Y. Civ. Pro. 380.
1626 *et seq.* Frank v. Davis.....22 N. Y. Civ. Pro. 425.
1627 Whittemore v. Judd Linseed Oil Co...16 Daly, 299.
1638 Diefendorf v. Diefendorf.....132 N. Y. 100.
1638 Bohn v. Hatch.....133 N. Y. 64.
1639 Diefendorf v. Diefendorf.....132 N. Y. 100.
1665 Thompson v. Manhattan Railway Co...130 N. Y. 360.
1665 Biggart v. Manhattan Railway Co.....16 Daly, 508.
1681 Thompson v. Manhattan Railway Co...130 N. Y. 360.
1780 Brown v. Weppner.....62 Hun, 579.
1787 *et seq.* Bowman v. Hoffman.....22 N. Y. Civ. Pro. 371.
1756, subd. 3 Dickenson v. Dickenson.....63 Hun, 516.
1759 Romaine v. Chauncey.....129 N. Y. 566.
1759, subd. 2 Chamberlain v. Chamberlain..63 Hun, 96.
1771 Chamberlain v. Chamberlain.....63 Hun, 96.
1779 Globe Yarn Mills v. Bilbrough.....22 N. Y. Civ. Pro. 186.
1780 Parry v. Erie Transfer Co.....22 N. Y. Civ. Pro. 178.
1780 Adler v. Order of Fraternal Circle of Baltimore City.....22 N. Y. Civ. Pro. 386.
1798 People v. Buffalo Stone & Cement Co. 131 N. Y. 140.
1810 Glines v. Iron Hall.....22 N. Y. Civ. Pro. 486.
1819 Backus v. Kimball.....62 Hun, 122.
1822 Wilder v. Ballou.....63 Hun, 118.
1835 Effray v. Masson.....22 N. Y. Civ. Pro. 59.
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2090 People *v.* Meakim.....133 N. Y. 214.
2122 People *ex rel. v.* Wemple.....129 N. Y. 543.
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2142 Haebler *v.* Myers.....132 N. Y. 363.
2162 Matter of Cohen.....16 Daly, 70, 71.
2165 Matter of Cohen.....16 Daly, 70, 71.
2235 Fuchs *v.* Cohn.....22 N. Y. Civ. Pro. 269.
2235 Ash *v.* Pennell.....16 Daly, 190.
2251 Ash *v.* Pennell.....16 Daly, 194.
2253 Ash *v.* Pennell.....16 Daly, 194.
2253 Gallagher *v.* Reiley.....16 Daly, 228.
2260 Mench *v.* Yung.....16 Daly, 144.
2263 Haebler *v.* Myers.....132 N. Y. 363.
2263 Mooney *v.* N. Y. El. R. R.....16 Daly, 145.
2313 Eisler *v.* Union Transfer Co.....16 Daly, 460.
2320 Matter of Dunne.....64 Hun, 18.
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2432 *et seq.* Duffy *v.* Dawson.....22 N. Y. Civ. Pro. 235.
2436 Levy *v.* Beacham.....64 Hun, 62.
2437 Frost *v.* Craig.....16 Daly, 109.
2438 Frost *v.* Craig.....16 Daly, 109.
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2447 McShane *v.* Pinkham.....22 N. Y. Civ. Pro. 173.
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2474 *In re* Ryder.....129 N. Y. 640.
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2530 *In re* Mary Monell.....22 N. Y. Civ. Pro. 377.
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2558 Douglass *v.* Yost.....64 Hun, 155.
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2588 Matter of Patterson.....63 Hun, 529.
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2624 *In re* Will of Schrader.....22 N. Y. Civ. Pro. 55.
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2650 *In re* Stewart.....131 N. Y. 274.
2650 *In re* Myers.....131 N. Y. 409.
2668 Hall *v.* Brennan.....64 Hun, 394.
2717 Estate of Moderno.....22 N. Y. Civ. Pro. 72.
2717 Backus *v.* Kimball.....62 Hun, 122.
2717 Matter of Moderno.....63 Hun, 261.
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2749 Matter of Gautert.....63 Hun, 280.
2759 Kingsland *v.* Murray.....133 N. Y. 170.
2868 Gould *v.* Patterson.....22 N. Y. Civ. Pro. 230.
2868 Gould *v.* Patterson.....63 Hun, 575.
2879 Jepson *v.* Postal Telegraph Cable Co..22 N. Y. Civ. Pro. 433.
2930 Brown *v.* Weppner.....62 Hun, 579.
2931 Brown *v.* Weppner.....62 Hun, 579.
2951 Gould *v.* Patterson.....22 N. Y. Civ. Pro. 230.
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2952 Gould *v.* Patterson.....22 N. Y. Civ. Pro. 230.
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3050 Janeway *v.* Haft.....22 N. Y. Civ. Pro. 290.
3050 Bonnett *v.* Townsend.....63 Hun, 45.
3057 Jourdan *v.* Healey.....22 N. Y. Civ. Pro. 157.
3058 Haebler *v.* Myers.....132 N. Y. 363.
3060 Moench *v.* Yung.....16 Daly, 144.
3060 Eisler *v.* Union Transfer Co.....16 Daly, 460.
3066, subd. 3 Eisler *v.* Union Transfer Co..16 Daly, 460.
3067 Moench *v.* Yung.....16 Daly, 144.
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3165, subd. 2 Delmel *v.* Scheveland.....16 Daly, 37.
3169, subd. 1 Rothschild *v.* Dithredge Flint Glass Co.....22 N. Y. Civ. Pro. 314.
3191 Whitfield *v.* Broadway & Seventh Ave. R. R.....16 Daly, 288.
3191 Schnauffer *v.* Catterbury.....16 Daly, 354.
3191 Horn *v.* Terry.....22 N. Y. Civ. Pro. 430.
3213 Moench *v.* Yung.....16 Daly, 144.

3228 Mattes *v.* Pause.....22 N. Y. Civ. Pro. 41.
3228 Weston *v.* Stoddard.....22 N. Y. Civ. Pro. 51.
3228 Kemp *v.* Union Gas & Oil Stove Co...22 N. Y. Civ. Pro. 190.
3229 Weston *v.* Stoddard.....22 N. Y. Civ. Pro. 51.
3229 Kemp *v.* Union Gas & Oil Stove Co...22 N. Y. Civ. Pro. 190.
3234 Burns *v.* Delaware, Lackawanna & Western R. R. Co.....22 N. Y. Civ. Pro. 43.
3234 Browning *v.* N. Y., Lake Erie & Western R. R. Co.....22 N. Y. Civ. Pro. 198.
3234 Burns *v.* D., L. & W. R. R. Co.....68 Hun, 19.
3234 Browning *v.* N. Y., Lake Erie & Western R. R. Co.....64 Hun, 513.
3240 People *v.* Pratt.....22 N. Y. Civ. Pro. 294.
3240 Hollock *v.* Bacon.....64 Hun, 90.
3247 O'Connor *v.* Mechanics' Bank.....22 N. Y. Civ. Pro. 393.
3251 Gowing *v.* Levy.....22 N. Y. Civ. Pro. 10.
3253 Bradley *v.* Walker.....22 N. Y. Civ. Pro. 1.
3253 Dr. Jaeger's Sanitary Woolen System Co. *v.* Le Boutillier.....22 N. Y. Civ. Pro. 6.
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3253 People *v.* Fitchburg Railway Co.....133 N. Y. 239.
3256 Seasongood *v.* N. Y. Elevated R. R. Co.....22 N. Y. Civ. Pro. 100.
3268 Hawes *v.* Judd.....16 Daly, 111.
3271 Knoch *v.* Funcke.....22 N. Y. Civ. Pro. 161.
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3280 People *ex rel.* Sutliff *v.* Supervisors....64 Hun, 375.
3296 Griggs *v.* Day.....22 N. Y. Civ. Pro. 146.
3296 O'Neil *v.* Howe.....16 Daly, 185.
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3347 Mattes *v.* Pause.....22 N. Y. Civ. Pro. 41.
3360, subd. 7 Rochester Railway Co. *v.* Robinson.....133 N. Y. 242.
3366 *In re* St. Lawrence & Ad. Railway Co.133 N. Y. 270.
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CIVIL PROCEDURE REPORTS.

BRADLEY, RESPONDENT, *v.* WALKER, APPELLANT.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL TERM; JANUARY, 1892.

§ 3253.

Additional allowance—when not granted because no basis upon which to compute—Deed—effect of defective acknowledgment—notice from record of restrictive covenants.

A determination made upon an appeal from an order vacating an injunction is decisive as to all questions so determined upon an appeal to the same court from a judgment rendered in the same action.[1]

A purchaser of real estate with notice of an equity attached to it buys subject to that equity and must conform to the mode of occupation and use of the estate, however restrictive, that was enjoined upon or attached to his grantor.[2]

Bradley *v.* Walker (14 *N. Y. Supp.* 315) followed.[2]

Notice to a purchaser of real property of a covenant restricting its use or occupation may be impliable from circumstances [3]; and where the adjoining houses on the same block in a city are set back eight feet from the street line and have remained so for many years, and this large open space in front of the houses is not usual in the city, these facts in themselves are circumstances which might well put a purchaser upon inquiry as to whether they existed because of a restrictive covenant.[4]

Tallmadge v. East River Bank (2 *Duer*, 614, aff'd 26 *N. Y.* 105) followed.[3, 4]

Where, in an action to restrain the proposed violation by a purchaser of real property of a covenant contained in a recorded agreement executed by one under whom he claims that buildings erected on said lands should stand eight feet back from the line of the street, it appeared that the attorney who represented the defendant on the trial of the action had examined the title to the premises and he was not called to testify that in such examination he had failed to discover the existence of such covenant,—*Held*, that, under the circumstances, there was a conclusive presumption that the defendant had actual notice of the covenant;[5] that notice to the attorney in an investigation of a title is notice to his client,[6] and a purchaser of real property must be presumed to examine every deed or instrument forming a part of his chain of title,[8] and must be deemed to know every fact disclosed by the instruments of record affecting said property;[7] that the fact that the defendant did not have actual notice would not relieve him from the obligation imposed by said instruments.[7]

Kendall v. Niebuhr (45 *Super. Ct.* 542, aff'd 46 *Id.* 544) followed.[5]

Where, in such a case, the agreement was not properly recorded as to the defendant's grantor because her acknowledgment was defective, but was properly recorded as to other parties to it,—*Held*, that the defendant could not in law see a part without the whole, and he would thereby have actual notice through his attorney who searched the title.[9]

Where the subject-matter involved in an action is not capable of a money value or the money value is not shown, an additional allowance is not authorized.[11]

Where, in an action to enjoin the violation of an agreement restricting the use of real property, there is no evidence of the value of the subject-matter involved and no sum recovered beyond the costs, the court cannot properly grant an additional allowance of $250.[10]

(*Decided January* 29, 1892.)

Appeal by the defendant from a judgment of the special term enjoining the defendant from erecting and maintaining structures in front of his premises in violation of a covenant agreement, and also from an order granting an extra allowance.

Sufficient facts appear in the opinion.

Henry Holt, for defendant, appellant.

George W. Cotterill, for plaintiff, respondent.

GILDERSLEEVE, J.—By a judgment of the court below the defendant was enjoined from erecting and maintaining structures in front of his premises in violation of a covenant agreement entered into by prior owners of this and adjacent property, reserving a space of eight feet in front of the street line. The questions of law involved in this case, and requiring consideration for its proper determination, were all substantially decided by a former general term of this court on an appeal from the order vacating the injunction granted at the inception of the action. See Bradley *v.* Walker, opinion by MCADAM, J., 14 *N. Y. Supp.* 315. In the above-mentioned [1] opinion, the question of the defendant's notice of the agreement is not fully discussed; and the claim of his learned counsel that, on the former appeal, it was assumed that the defendant purchased the premises with notice is not without foundation. We now propose to discuss this question, and also give attention to the alleged error in granting plaintiff an allowance of $250. We hold the former general term opinion to be decisive of all other material matters herein. Whoever purchases real estate with notice of any equity attaching to it buys subject to that equity. He must conform to the mode of occupation and use of the estate, [2] however restricted, that was enjoined upon or attached to his grantor. Bradley *v.* Walker, *supra*, and authorities there cited. The notice may be implied from circumstances. In Tallmadge *v.* East River Bank, (2 *Duer*, 614, affirmed 26 *N. Y.* 105), the court held [3] "that the uniformity of the position of all the houses on St. Mark's place was probably suffi-

cient, alone, to put the defendant on inquiry." See, also, Maxwell *v.* East River Bank, 3 *Bosw.* 124; Perkins *v.* Coddington, 4 *Robt.* 647; Greene *v.* Creighton, 7 *R. I.* 1.

The house in question, and the adjoining houses in the same block, are actually set back eight feet [4] from the line, and have remained so for many years. The large open space thus allowed in front of these houses is not usual in the city of New York, and is of itself a circumstance that might well put the purchaser on inquiry. In Tallmadge *v.* East River Bank, *supra*, the notice was not wholly by implication. There was testimony in the case that justified a finding of actual notice. Nevertheless the case is authority in support of the doctrine for which we here contend. But in the case at bar the fact of the notice does not rest upon an implication from circumstances above set forth.

The covenant agreement under consideration here [5] was regularly recorded, and this, in and by itself, was notice. This court, in Kendall *v.* Niebuhr, 45 *Super. Ct.* 542 (FREEDMAN, J., writing the opinion), affirmed at general term (46 *Super. Ct.* 544), held that "a mortgagee employing an attorney to make searches, prepare releases, etc., is chargeable with knowledge of a recorded conveyance, though the fact was not communicated to him by the attorney. The presumption is that the attorney found the record in discharge of his professional duty, and the presumption becomes conclusive by the attorney's omission to testify to the contrary when called as a witness." In the case at bar the defendant's attorney was present and conducted the trial, but remained mute on this point. Notice to an attorney in the investigation of a title is notice to his client.

[6] See Griffith *v.* Griffith, 9 *Paige*, 315; *Weeks, Attys* p. 407, § 237. Purchasers must be deemed to know every fact disclosed by the instruments of record affecting the property purchased; and the fact [7] of such purchasers not having actual notice will

not relieve them from obligations imposed by said instruments. A purchaser must be presumed to examine every recorded deed, or instrument forming a part of it. See Acer *v.* Westcott, 46 *N. Y.* 384; McPherson *v.* Rollins, 107 *Id.* 322.

[8]

If it is held that the agreement was not properly recorded as to defendant's grantor, Mrs. Alvord, on account of her defective acknowledgment, inasmuch as it was properly recorded as to the other parties to the agreement, the defendant could not in law see a part without the whole, and he would thereby have actual notice through his attorney who searched the title. See 2 *Pom. Eq. Jur.* pp. 16, 17, 92.

[9]

With regard to the granting of an extra allowance of $250, we think the court below fell into error. Subdivision 2 of section 3253 of the Code provides that an extra allowance may be given "in any other case" (other than an action to foreclose a mortgage) "specified in this section, a sum not exceeding five per centum upon the sum recovered or claimed, or the value of the subject-matter involved." In the case at bar there is no evidence of the value of the subject-matter involved, and no sum recovered beyond the costs and extra allowance, while the amount claimed as damages is $1000, 5 per centum of which would be less than the $250 granted as extra allowance by the court below. Thus, in any view of the case, the granting of the extra allowance of $250 was improper. Where the subject-matter involved is not capable of a money value, or the value is not shown, an allowance is not authorized. See Conaughty *v.* Saratoga Co. Bank, 92 *N. Y.* 401; People *v.* Railroad Co., 5 *Lans.* 25; Coates *v.* Goddard, 34 *Super. Ct.* 118; Munro *v.* Smith, 17 *N. Y. Civ. Pro.* 158. This error, however, is one that can be remedied without reversing the judgment, which in all other respects is fully warranted.

[10]

[11]

We are of the opinion that the judgment must be

modified by deducting therefrom the sum of $250, and as thus modified the judgment appealed from is affirmed, with costs.

FREEDMAN, J., concurred.

DR. JAEGER'S SANITARY WOOLEN SYSTEM CO., APPELLANT, *v.* LE BOUTILLIER, RESPONDENT.

SAME, APPELLANT, *v.* LOESER *et al.*, RESPONDENT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; FEBRUARY, 1892.

§ 3253.

Additional allowance—when cannot be granted where trade-mark subject of action.

In an action to enjoin alleged infringements of a trade-mark, and to recover damages arising from profits made by the defendants out of the alleged infringement, where it was determined that a trade-mark did not exist, the defendant cannot be granted an extra allowance; the real contest is as to the trade-mark right, and it having been determined that no such right existed, there was no question in the case as to damages and no basis upon which an allowance could be granted.

Weaver *v.* Ely (83 *N. Y.* 89); Conaughty *v.* Saratoga County Bank (92 *N. Y.* 401); Adams *v.* Arkenburgh (106 *N. Y.* 615) followed; Monroe *v.* Smith (17 *N. Y. Civ. Pro.* 158) distinguished.

(*Decided February* 18, 1892.)

Appeal by the plaintiffs in two actions entitled as above, from orders appointing a referee to take testimony as to the value of trade-mark for use upon a motion for an additional allowance in actions to restrain infringements of said trade-mark wherein the complaints had been dismissed.

The facts appear in the opinions.

Samuel B. Clark (*Root & Clark*, and *J. Van Santvoord*, attorneys), for plaintiffs, appellants.

R. S. Maynard (*Grepel & Raegener*, attorneys), for defendants, respondents.

PATTERSON, J.—These are appeals from orders in two actions brought for infringement of an alleged trade-mark right claimed by the plaintiff. Judgment in each action was for the defendant. In the case against Le Boutillier a temporary injunction was granted. The defendant in each case moved for an extra allowance, and the court below directed a reference in each case, to take proof of the value of the plaintiff's alleged trade-mark, with a view to granting such additional allowance; and, in connection with the order in the Le Boutillier case, the referee was authorized to ascertain the damages caused by the injunction.

No objection is made to that part of the order last referred to, and the only question requiring consideration is as to the ordering of the reference in aid of the motions for an extra allowance, and that, of course, depends upon the power of the court to grant such an allowance in cases of this character. We are of the opinion that such power does not exist.

The whole subject is regulated by statute. Section 3253 of the Code of Civil Procedure confers the only authority the court has concerning it, and it is expressly stated there that in all cases not otherwise provided for an extra allowance may in the discretion of the court be granted upon a "sum recovered or claimed, or the value of the subject-matter involved." There was no sum claimed by the plaintiff, except as incidental damages, arising from alleged profits made by the defendants out of the infringement of the trade-mark claimed, but the

real contest was as to the trade-mark right, and, it having been determined that no such right existed, there was no question in the case at all as to damages. They could only have resulted from an accounting after a determination that the plaintiff was entitled to judgment on the real issue, and Weaver *v.* Ely (83 *N. Y.* 89) is quite in point. That was an action for an accounting, and for the payment of any amount found due on such accounting. The complaint was dismissed on findings which showed the defendants were not liable to account. Extra allowances were awarded them, but the court of appeals held in reversing the orders, in substance, that where undefined and unascertained interests, dependent wholly on the result of previous inquiry, are in question, and the main relief is denied, there is nothing upon which an allowance may be based.

Conaughty *v.* Saratoga Co. Bank, (92 *N. Y.* 401), defines also what is meant by the word "involved," in the section of the Code above alluded to. It means the possession, ownership, or title to the property or other valuable thing which is to be determined by the result of the action. That, in these cases, was the trade-mark, and nothing else.

There are several cases on this subject more recent than those cited by counsel, and among them is Adams *v.* Arkenburgh (106 *N. Y.* 615), and in that case a distinction is made between it and Weaver *v.* Ely, *supra.* The opinion in each of those cases was written by the same judge (DANFORTH), but it was held in the later case that there was a specific value to be fixed upon the result of an accounting, under the peculiar facts of the case,—it was for a copartnership accounting,—and that the matter should not have been disposed of as a question of law. Here the subject comes up distinctly as a question of law, and our decision is put upon the plain ground that in such a case as this an extra allowance cannot be granted to a defendant, on the dismissal of a complaint

seeking an accounting, where the judgment of the court is final that such an accounting cannot be had, and for the reason that any further claim is merely incidental. Moore *v.* Appleby, 108 *N. Y.* 237.

But it is further contended that there was a value to the trade-mark, and that, therefore, something existed and was in controversy coming within the requirement of the law, as above stated. What possible value a mere trade-mark right can have *per se*, ascertainable by a money standard, it is difficult to understand in the absence of proof. But when it is adjudged that no trade-mark right exists at all, it is more difficult to comprehend what value can be attached to that which is non-existent. Nothing was really involved but the right to the trade-mark.

The case of Munro *v.* Smith (17 *N. Y. Civ. Pro.* 158)* is referred to as being an authority in favor of the granting of an allowance to the defendant. No such deduction is to be fairly drawn from that case. The learned judge who wrote the opinion there made careful reference to Coates *v.* Goddard (34 *Super. Ct.* [2 *J. & S.*] 118), in which it was held that no money value could be assigned to a trade-mark; and it is quite evident that the allowance was made in the Munro case on the undisputed testimony that the trade-mark was worth the sum of $50,000.

The orders, so far as they provide for a reference as to an extra allowance, are reversed, with costs and disbursements; but in the Le Boutillier case so much of the order as provides for ascertaining damages on the injunction is affirmed.

VAN BRUNT, P.J., and O'BRIEN, J., concurred.

* An appeal taken to the court of appeals from this decision was dismissed, see Memo., 119 *N. Y.* 630.

GOWING *et al.*, RESPONDENTS, *v.* LEVY *et al.*, APPELLANTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; FEBRUARY, 1892.

§§ 977, 3251.

Costs—trial fee when not taxable—term fee when not taxable—effect of notice of trial for term for which note of issue not filed.

Where a plaintiff is granted leave to amend his complaint upon paying defendant's costs and disbursements to date, and there has been no trial, the defendant is not entitled to a trial fee.

Where a note of issue was filed June 12, 1889, and notice of trial first given for the February, 1891, term, and the case then appeared upon the calendar and went off by stipulation between the parties, and the plaintiff in December, 1891, was permitted to amend his complaint on paying costs to date—*Held*, that the defendant was not entitled to any term fees.

Where a note of issue was not filed for any month for which a cause was noticed for trial, such notice is ineffectual and the cause cannot be moved for trial, because of its service, although a note of issue had previously been filed. While but one notice of trial is required to be served in the first judicial district, it is the service of that notice that calls upon the party to ascertain the situation of his cause upon the calendar, and when he receives it for a specific term he is not bound to look back upon the calendar to see if his adversary has put it on for some prior or subsequent term.

(*Decided February* 18, 1892.)

Appeal by the defendant from an order of the New York county special term denying a motion for a new taxation of costs.

The facts appear in the opinion.

Ira Leo Bamberger, for defendants' appellants.

Henry Stanton, for plaintiffs, respondents.

PATTERSON, J.—In December, 1891, Mr. Justice ANDREWS granted a motion allowing the plaintiffs to serve an amended complaint on payment of the defendants' costs and disbursements to date, to be taxed by the clerk. On presentation of the bill of costs the clerk disallowed a trial fee of $30 and five term fees of $10 each. The cause had not, prior to February, 1891, been reached in its order on the calendar, but was awaiting its turn. An application was made to the court to review the taxation of the clerk, and, after hearing the parties, Mr. Justice BARRETT sustained the refusal of the clerk to allow the items insisted upon by the defendants. In this he was clearly right. There had been no trial, and consequently a trial fee was not taxable. Studwell *v.* Baxter, 33 *Hun*, 331. As to the five term fees, there was enough before the court to show that the case was on the calendar under notice of trial for the first time in February, 1891, and then went off by a stipulation between the parties. These facts are shown by the affidavit of Mr. Stanton, which very materially modifies what was sworn to by Mr. Levy as to the case having been duly noticed for trial for previous months, and it is also thus made to appear that there was no correspondence between the note of issue filed June 12, 1889, and the first notice of trial given for the February term, 1891. A note of issue not having been filed for any month for which the cause was noticed for trial, such notice was ineffectual, and the cause could not be moved for trial because of its service.

While but one notice of trial is required to be served in this judicial district, it is the service of that notice that calls upon the party to ascertain the situation of his

cause on the calendar; and when he receives it for a specified term he is not bound to look back upon the calendar to see if his adversary has put it on for some prior or subsequent term. *Code Civ. Pro.* § 977.

The order was right, and must be affirmed, with $10 costs and disbursements.

VAN BRUNT, P.J., concurred.—O'BRIEN, J., concurred in result.

In re CITY OF MIDDLETOWN.

SUPREME COURT, SECOND DEPARTMENT, GENERAL TERM; FEBRUARY, 1892.

§ 46.

Commissioners to lay out streets—when not disqualified because related to one owning property affected.

One appointed a commissioner in a proceeding to lay out streets in a city pursuant to the provisions of an act requiring the appointment of three disinterested freeholders for that purpose is not disqualified because he stands in the relation of brother-in-law to a party whose interest is likely to be affected, without proof of some direct interest of his own in the affair [1].

In re Dodge & Stephenson Manufacturing Co. (77 *N. Y.* 101) followed [2].

Section 46 of the Code of Civil Procedure forbidding a judge from sitting or taking part in a decision of any case or matter if he is related by consanguinity or affinity to any party to the controversy within the sixth degree does not apply to commissioners appointed in a proceeding to open and lay out streets solely for the purpose of looking into the general necessity and bearing of the street extensions, where their decision is subject to the subsequent scrutiny and oversight of the court both as to the

amount of damages and in every other respect.[3] Said provision of the Code should be strictly construed [4].

In re City of Middletown (21 *N. Y. Civ. Pro.* 201) reversed.

(*Decided February* 8, 1892.)

Appeal by S. Albert Bull and Frank D. Youngblood, owners of land to be taken for street purposes in the city of Middletown, from an order made in a proceeding to open, lay out and extend such street made upon a motion of Thomas Neville, an owner of land affected by such proceeding, removing Henry M. Wiggins, one of the commissioners appointed in said proceeding.

This is a proceeding brought pursuant to the provision of the city charter of the city of Middletown (Laws of 1888, chap. 535, tit. 6, §§ 5, 6, 7) to open, lay out and extent Ogden Street in said city. Section 7 of that act provides that: "Whenever any order shall be passed by the common council directing the laying out, extending, making or widening of any street, alley, road, lane or highway in said city, they shall apply to the county court of Orange county, . . . or to a special term of the supreme court, in the second judicial district, for the appointment of three disinterested freeholders, as commissioners to estimate and assess the expense of said improvement, and the value of each parcel of the land taken for the same and the damages sustained by any person or persons by reason of such improvement, and the amount to be allowed to each person, respectively, and also to ascertain and determine what real estate will be benefited by such improvement, and to apportion and assess the entire cost of the improvement, with the expenses thereof, upon the several parcels of land benefited thereby, in proportion, as near as may be, to the benefit resulting to each."

Under this provision the common council of the city of Middletown having directed the opening, laying out and extension of said street, the county court of Orange

county appointed three commissioners, one of whom was Henry Wiggins, the commissioner removed by the order appealed from. The commissioners duly qualified and entered upon the performance of their duties, and while the proceedings before them were pending Thomas Neville, an owner of land likely to be affected by the proceedings, made the motion which resulted in the order appealed from.

Other facts appear in the opinion.

William F. O'Neill, for appellant.

S. S. Gowdey, for Thomas Neville, respondent.

BARNARD, P.J.—This is an appeal from an order of the county judge of Orange county removing one Henry W. Wiggins from his office as commissioner in the above-entitled proceeding, to which said office he had previously been appointed by the said county court, for the reason that Wiggins was a brother-in-law of one A. V. Boak, who was a silent partner with the firm of Bull & Youngblood in the ownership of certain lands affected, or likely to be affected, by the said condemnation proceedings.

The appointment of Mr. Wiggins as one of the three commissioners was made under chapter 535 of the Laws of 1888 (and the subsequent amendments thereto), entitled "An act to incorporate the city of Middletown," and in section 7 of title 6 of this act the appointment of three disinterested freeholders is required. No further qualification is demanded of the commissioners except that they shall be disinterested; and we are of the opinion that the county judge of Orange county erred in holding that section 46 of the Code of Civil Procedure applies to commissioners of this nature, or that by reason of standing in the relation of brother-in-law to a party whose interest is likely to be affected

[1]

a commissioner thereby ceases to be disinterested, without proof of some direct interest of his own in the affair.

In re Dodge & Stephenson Manuf'g Co. (77 *N. Y.* 101) the learned court, in its opinion, says: "This language does not seem appropriate to such a case as the present, but rather to a case where there are parties adverse to each other, or at least where some question is to be determined between two or more parties; but, passing this question, it is very certain that to exclude a judge from sitting in any cause by reason of kinship, such kinship must exist between him and some person who is actually a party to the cause. It is not enough that he is related to some person not a party who is or may be interested in it or affected by his order. Interest on the part of a judge disqualifies him from sitting, but interest on the part of a relative of the judge does not."

[2]

We are furthermore of the opinion that the section of the Code referred to does not include commissioners among and along with judges and officers exercising judicial or *quasi*-judicial functions. This commission was solely for the purpose of looking into the general necessity and bearing of the proposed street extension, and their decision was subject to the subsequent scrutiny and oversight of the court, both as to the amount of damages and in every other respect.

[3]

This provision of the Code needs to be strictly construed, as under a liberal construction it could be made to apply to almost every class of court appointees or elective officers of towns or municipalities exercising a power in any respect resembling the judicial. People *v.* Wheeler, 21 *N. Y.* 82; Foot *v.* Stiles, 57 *Id.* 399; *In re* Southern Boulevard, 3 *Abb. Pr. N. S.* 477; People *v.* Mayor, 63 *N. Y.* 291.

[4]

The order appealed from should therefore be reversed, with costs and disbursements of the appeal.

DYKMAN and PRATT, JJ., concurred.

LAMMING, RESPONDENT, *v.* GALUSHA *et al.*, APPELLANT.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL TERM; JANUARY, 1892.

§§ 483, 484.

Pleading—cause of action for nuisance cannot be united with cause of action for damages for personal injuries—Separately stating and numbering causes of action.

A cause of action to restrain and recover damages for a nuisance consisting of the unlawful maintenance and operation of the defendant's steam railway in a public street from which the plaintiff has suffered special and peculiar injuries other than the public at large, is improperly united in the same complaint with a cause of action to recover damages for personal injuries received by the plaintiff by the negligent operation of said road on a particular day. The negligent act of running a train on a particular trip cannot be said to arise out of the same transaction as the maintenance of the nuisance which constitutes the general burden of the complaint, nor is it connected with the same subject of action.

A defendant is not precluded from demurring to a complaint on the ground that two causes of action are improperly united therein because said causes of action are not separated or stated to be independent of each other and are not separately numbered.

Wiles *v.* Suydam (64 *N. Y.* 173); Goldberg *v.* Utley (60 *Id.* 427) followed.

(*Decided January*, 1892.)

Appeal by defendants from an interlocutory judgment of the Monroe county special term overruling a demurrer to the plaintiff's complaint.

The facts are stated in the opinion.

Cassius C. Davy, for defendant, appellant.

Henry W. Conklin, for plaintiff, respondent.

MACOMBER, J.—The demurrer is placed upon the ground that it appears upon the face of the complaint that causes of action have been improperly united, naming four particulars.

The plaintiff is the owner of certain lands in Irondequoit lying along North avenue, which extends from the city of Rochester to the Ridge road, and also of lands on the Ridge road, near the intersection of that highway with North avenue, particularly described in the complaint. These premises are used for farming purposes, raising vegetables and fruits for market in the city of Rochester, where they are carried by wagon, which makes nearly daily trips during several months, and goes two or three times a week during the remainder of the year. The plaintiff, with his family, also goes to the city of Rochester for worship, being attendants upon a church there. The usual and most convenient and natural route from the plaintiff's dwelling, which is near the Ridge road, on a street known as Garden street, as well as from other parts of the plaintiff's land, to and from the city of Rochester, is along the Ridge road and North avenue to Bay street, which is within the city limits, a distance of about two miles. Any other route is circuitous, and, it is alleged, is inconvenient, and involves travelling half a mile further, at additional delay, labor and expense.

Thence follow allegations showing with much circumstantiality that the defendants, before and since the first day of July, 1887, to the present time, have habitually interrupted access to his houses, and interfered with the use of a sand and gravel bed on his premises, and the easy marketing of his crops, by the unlawful construction and operation in these public highways of a rail-

road operated by steam; that plaintiff's lands extend to the centre of both North avenue and Ridge road, and that the defendants have wrongfully and unlawfully built and maintained high embankments in North avenue, obstructing the natural drainage of the road and otherwise obstructed travel thereon and on the Ridge road, rendering them during certain seasons of the year impassable to vehicles; that said embankments cause the drifting and accumulation of snow so that the highway cannot be travelled. Suffice it to say, in short, that the grievances of the public, as well as the plaintiff's personal grievances, are set forth in much detail. The complaint also contains suitable allegations of special injuries peculiar to the plaintiff alone, other than those suffered by the public at large.

The facts of this case are summed up by another clause in the complaint, but to the same legal effect. It is there alleged that these acts of the defendants constitute a public nuisance and are a special injury to the plaintiff, and that, inasmuch as he has no adequate remedy at law, he comes into a court of equity and asks for damages and an injunction to restrain further wrongful operations of the railroad, under suitable allegations averring threats and intention on the part of the defendants to continue to maintain such nuisance.

Here is, clearly, a cause of action set forth alleging the existence of a public nuisance, and showing that the plaintiff has suffered special and peculiar damages other than the public at large. If these allegations are established by evidence and not overcome by affirmative defences, the plaintiff would be entitled to some relief (Adams *v.* Popham, 76 *N. Y.* 410).

The complaint, as above epitomized, is a unit and contains only one cause of action. But in the body thereof there are other allegations which certainly, for the purposes above mentioned, have no place there without any connection with the statement of the facts above

mentioned, but without being separately numbered, it is alleged as follows: "That on or about the 4th day of August, 1888, plaintiff, in the ordinary prosecution of his said business, was riding along said North avenue in his market or produce wagon, and was driving his own horse attached thereto and going toward the north; that said horse was a quiet and well-trained animal, accustomed to steam railroads and cars, and that plaintiff was driving with due care; that plaintiff had reached a point about midway between Norton street and the Ridge road; that thereupon one of said locomotive engines and train, operated by steam, approached from the south running at a high rate of speed, and making alarming noises by the escape of steam and otherwise, and without abating said speed or noise ran past plaintiff; that the approach of said train greatly frightened said horse, and as said train passed, said horse got beyond plaintiff's control and turned quickly, overturning said wagon, and threw plaintiff violently out of said wagon and to the ground; that said horse in his fright and struggle to escape stepped upon plaintiff's head, shoulder and the lower part of his body, wounding and bruising plaintiff; that plaintiff, as the result of said injuries, was confined to his bed for two weeks, and to his house for three weeks, and was necessarily under medical care for many weeks thereafter and suffered great pain; that said plaintiff has never recovered from said injuries, but is still subject at times to excruciating pains in said portions of his body, and never since said injuries has he been free from pain occasioned thereby; that since said injuries plaintiff has never been able to read or engage in mental labor except for a few moments at a time, without bringing on a dizziness and headache sufficient to compel the cessation from such reading and mental labor." Thence follow allegations that theretofore plaintiff was an unusually robust and healthy man, capable of doing hard and continuous labor; that such injury

incapacitated him for such labor, and the effects of the injuries to him are permanent and incurable.

In the general prayer for relief it is stated that the injuries which, as we have said, would give him a cause of action to restrain the continuance of the nuisance, are "in addition to the body and physical injuries already described."

Here, in the body of this complaint, as it seems to us, is a cause of action for personal injuries inflicted, as is alleged, by the defendants through their negligence in the management of their locomotive while passing along North avenue, and without fault on the plaintiff's part. This has no material bearing upon the facts as presenting the cause of action stated for relief against the nuisance. These allegations might be, and often are, true of a railroad whose right to operate its trains is unquestioned, but which is liable only for the negligent use thereof. It appears to us that in this respect there has been a misjoinder of causes of action; namely, one for the relief from a nuisance where the plaintiff has suffered special damages by reason of the continued unlawful use of the highways, and the other a cause of action which rests upon allegations only of negligence in the operation of a particular train at a given time, to the damage of the plaintiff, when he was without fault.

Sub-division 9 of section 484 of the Code of Civil Procedure is pressed upon our attention, where it is provided that there may be united in the same complaint claims arising out of the same transaction, or transactions connected with the same subject of action. But this negligent act of running a train on a particular trip cannot be said to arise out of the same transaction which constitutes the general burden of the complaint, nor is it connected with the same subject of action. The one cause of action is founded upon the maintenance of a nuisance, and the other for negligently operating a train on a particular occasion.

We conclude, therefore, that the demurrer was properly interposed, upon the ground that there were attempted to be joined in the complaint two causes of action, one for the relief against a continuing nuisance, and the other for personal injuries received through the negligence of the defendants, happening without fault of the plaintiff, and we are of the opinion that these causes of action cannot be united in the same complaint.

These two causes of action are not separated, or stated to be independent of each other, and they are not separately numbered. But, under the decisions of Wiles *v.* Suydam (64 *N.Y.* 173), and Goldberg *v.* Utley (60 *Id.* 427), the failure of the plaintiff to state them separately and to number them does not preclude the defendant from interposing his demurrer upon the ground named, and the latter is not left to his remedy of making a motion to compel the plaintiff to separate the causes of action and to separately number them.

For these reasons, we think the interlocutory judgment appealed from should be reversed.

DWIGHT, P.J., and LEWIS, J., concurred.

LENNON *v.* SMITH *et al.*

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM; MARCH, 1892.

§ 1011.

Reference—when new trial must be had before referee after reversal of former judgment.

A stipulation made in open court has the same force and effect as if made in writing.

Where an action has been referred for hearing and determination upon a stipulation, and the judgment of the referee is reversed upon appeal and a new trial ordered without any provision in the judgment of reversal as to how the new trials hall be had, a new referee must be appointed and a new trial had before him, unless the stipulation under which the refence was originally ordered especially provides otherwise.

A stipulation to refer, once given, remains operative, so far as prescribing the mode of trial is concerned, until the cause is finally disposed of, and binds the parties to trial by referee instead of by court or jury.

It seems that where a reference is ordered otherwise than upon stipulation and the judgment of the referee is reversed upon appeal without direction as to how a new trial shall be had, it is proper practice to appoint a new referee in case the reversal was upon a question of fact, but that the new trial may be had before the same referee if the reversal was upon a question of law.

(*Decided March*, 1892.)

Motion by the plaintiff to place this cause upon the equity calendar of this court for trial.

The facts are stated in the opinion.

Edward T. Wood (*Isaac Kugelman*, attorney), for plaintiff and motion.

Matthews & Smith, for defendants, opposed.

GIEGERICH, J.—This action was brought to foreclose a mechanic's lien, and by consent of the parties in open court it was sent to a referee for trial. The cause was tried before the referee agreed upon, who reported in favor of the defendant Smith, and judgment was entered in her favor. The plaintiff appealed from that judgment, and the general term affirmed it. An appeal from the judgment entered upon the order affirming the judgment entered on the report of the referee was then taken to the court of appeals, and the judgment was reversed and a new trial ordered, without specification or reservation as to the mode of trial.

The plaintiff now moves to place the cause upon the equity calendar of this court for trial, and this raises the question whether the simple reversal of the judgment on the report of a referee operates to vacate the order of reference. In Catlin *v.* Adirondack Co. (19 *Hun*, 389, aff'd 81 *N. Y.* 379), which arose prior to the amendment of 1879 to section 1011 of the Code of Civil Procedure, it was held that it stands, unless provision is made to the contrary or the order is vacated upon motion by the court at special term. But section 1011 of the Code of Civil Procedure, as amended, provides that where the referee was appointed by consent, and a new trial is granted, the court must appoint another referee, unless the stipulation expressly provides otherwise (Carter *v.* Wallace, 3 *How. Pr. N. S.* 354).

In the case at bar the consent to refer was made in open court, and it, therefore, has the same force and effect as if made in writing (Waterman *v.* Waterman, 37 *How. Pr.* 36; Leacroft *v.* Fowler, 7 *Id.* 259; Keaton *v.*

Ulster Plank Road Co., 7 *Id.* 41; 2 *Rumsey's Prac.* 342).*

It is not claimed that the stipulation made between the parties and embodied in the order of reference contains any provision that the court shall not appoint another referee in case a new trial is granted, and if the aforesaid provisions of the Code are applicable to this case, and I assume that they do apply, it follows that a new referee must be appointed upon application by either of the parties to the suit.

Previous to the amendment of the section of the Code above cited, it was and still is regarded as the established practice whenever the judgment is reversed on a question of fact upon which a referee has once passed, to grant a motion to send the retrial to a new referee (*Rumsey's Prac.* 383; Catlin *v.* Adirondack Co., 19 *Hun*, 389), and if the judgment of the referee is reversed on a question of law, it is not necessarily a ground for sending the case to a new referee upon a new trial (Billings *v.* Vanderbeck, 15 *How.* 295), except where the reference is by consent, although it is usual in such case to direct that the new trial be had before another referee, and that seems to be the better practice (2 *Rumsey's Prac.* 383; Schermerhorn *v.* Van Alen, 13 *How.* 82).

The judgment of the referee, it seems, was reversed on a question of fact as well as of law, and if these rules of practice were followed this cause would be sent to a new referee for retrial, even though the original reference were treated as one not on consent. But, under the authorities above cited, I am of opinion that the consent, given in open court and embodied in the original order, must be construed as the equivalent of a written stipulation to refer within the meaning of section 1011 of the Code. Considering the phraseology of such

* See General Rules of Practice, Rule 11, in regard to stipulations not made in open court.

section as a whole, the intention is manifest that a stipulation to refer, once given, shall remain operative, so far as prescribing the mode of trial is concerned, until the cause is finally disposed of. It binds the parties to trial by referee instead of by the court or a jury. This is clear from the direction that the court must appoint another referee in the event of the ordering of a new trial of an action which had been tried by the referee originally named.

For the reasons above stated, the motion will, therefore, be denied, but without costs, and without prejudice to any motion to be made by either of the parties for the appointment of another referee.

ROWLAND, APPELLANT, *v.* MILLER, *et al.*, RESPONDENT.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL TERM; FEBRUARY, 1892.

§§ 488, 531, 546, 1511.

Pleading—complaint in action for ejectment when insufficient.

Where in an action for ejectment what purports to be the description of the property sought to be recovered was the description of a straight line and nothing else,—*Held*, that, as it is impossible to deliver possession of a straight line, the complaint did not set forth facts sufficient to constitute a cause of action; that, as it described no property at all, there was nothing of which a bill of particulars could be given, and nothing to be made more definite and certain on motion.

(*Decided February*, 1892.)

Appeal by the plaintiff from an order of special term sustaining a demurrer to the complaint herein on the

ground that it does not state facts sufficient to constitute a cause of action.

The facts are stated in the opinion.

Lockwood & Hill, for plaintiffs, appellant.

Burrill, Zabriskie & Burrill, for defendants, respondent.

GILDERSLEEVE, J.—This is an action for ejectment. The description of the property in suit is set forth in the complaint as follows: "Commencing at a point in the easterly line of said premises, three and one-eighth inches southerly from the northerly line of said premises; and running thence westerly, to a point distant one and one-eighth inches southerly from a point in the said northerly line of said premises, distant nineteen feet westerly from the easterly line thereof."

This is a description of a straight line, and nothing else.

Section 1511 of the Code of Civil Procedure provides that "the complaint must describe the property claimed with common certainty, by setting forth the name of the township or tract, and the number of the lot, if there is any, or in some other appropriate manner; so that, from the description, possession of the property claimed may be delivered where the plaintiff is entitled thereto."

As it is impossible to deliver possession of a straight line, the complaint clearly does not set forth facts sufficient to constitute a cause of action; and, therefore, the demurrer must be sustained (Code, *Civ. Pro.* § 488).

The complaint does not describe any property at all, and there is, therefore, nothing of which a bill of particulars can be given and nothing to be made more definite and certain by motion, under section 546 of the Code.

It consequently follows that defendants' proper course was to demur. (See Budd *v.* Bingham, 18 *Barb.* 494.)

The judgment and order appealed from are affirmed, with costs.

SEDGWICK, C.J., and DUGRO, J., concurred.

SMITH, AS EXECUTOR, ETC., RESPONDENT, *v.* RENTZ, APPELLANT.

COURT OF APPEALS; FEBRUARY, 1892.

§§ 870 *et seq.*

Documentary evidence—when production of books pursuant to notice does not make it necessary to introduce them in evidence.

Where upon the examination of the plaintiff as a party before trial the defendant had given the plaintiff notice to produce books of his testator, and he had done so, and they were inspected by the defendant's counsel, but were not used upon the examination, nor were any questions asked founded upon the entries therein,—*Held*, that it was error to receive them in evidence upon the trial of the action because they were so produced.[1-10]

Carradine *v.* Hotchkiss (120 *N. Y.* 608)[2]; Kenny *v.* Clarkson (1 *Johns.* 385)[5]; Sayer *v.* Kitchen (1 *Esp.* 209)[6]; Withers *v.* Gillespy (7 *Ser. & R.* [*Pa.*] 10)[8]; Austin *v.* Thomson (45 *N. H.* 113)[8] followed; Calvert *v.* Flower (7 *Car. & P.* 386)[7]; Clark *v.* Fletcher (1 *Allen* [*Mass.*], 53)[9]; Blake *v.* Russ (53 *Me.* 360)[9]; Randall *v.* Chesapeake Co. (1 *Har.* [*Del.*] 284)[9] not followed; Lawrence *v.* Van Horne (1 *Cai.* 276) distinguished.[4, 5]

A party calling for books and papers is not compelled to put them in evidence merely because he has called for and inspected them, but *it seems* that if the party having them fails to produce them or refuses to permit inspection, he who demanded their production may give secondary evidence of their contents,

which the party having the books cannot answer by producing them.[10]

Rule that the books of a tradesman or other person engaged in business containing items of accounts, kept in the ordinary course of book accounts, are admissible in evidence in favor of the person keeping them against the party against whom the charges are made, after certain preliminary facts are shown, has no application to the case of books or entries relating to cash items or dealings between the parties.[10-13]

Volbourd v. Thayer (13 *Johns.* 461) followed[13]; Smith v. Rentz (60 *Hun*, 85) reversed.[14]

(*Decided February*, 1892.)

Appeal by the defendant from a judgment of the general term of the supreme court in the first department affirming a judgment entered upon the decision of a referee. The facts are stated in the opinion.

Leopold Leo, for defendant, appellant.

H. B. Closson, for plaintiff, respondent.

ANDREWS, J.—This action was brought to recover moneys advanced and paid out by the plaintiff's testator for the defendant. The complaint alleges that from 1882 to 1887 the testator was the banker and general business agent for the defendant, and that during said years the defendant, from time to time, deposited moneys with the testator, and the latter, as requested by the defendant, from her funds in his hands, and, when these were insufficient, from his own, paid her different sums in cash and also paid taxes and tradesmen's bills for which she was liable, and that there was a balance due the testator on account of such payment of $3744.75, which the plaintiff claimed to recover.

The answer contained a general denial and interposed special defences. On the trial before a referee the plaintiff offered in evidence the ledger kept by the

testator containing the items of the alleged account. It was admitted against the objection of the defendant.

Evidence was given on the part of the plaintiff independently of the ledger, tending to establish many of the items of the account, but a considerable number of the items for which a recovery was had are supported by the ledger alone. If the ledger was improperly admitted in evidence, the judgment must be reversed. It was admitted not only to establish the items, of which there was no other proof, but its admission may have influenced the referee in passing upon the items of the account of which it was not the sole evidence.

The referee admitted the ledger on the ground that the defendant had under the Code examined
[1] the plaintiff before trial, and in that proceeding had given notice to the plaintiff to produce the books of the testator, and that upon such notice the plaintiff produced certain books of the decedent, among which was the ledger containing his account with the defendant, which was inspected by the defendant's counsel.

The referee held that the ledger was thereby made evidence for the plaintiff.

The ledger was not used on the examination, nor were any questions asked founded upon the entries therein.

A similar question was before the second division of this court, in Carradine *v.* Hotchkiss (120 *N. Y.* 608). There the plaintiff, on the request of the defend-
[2] ant's counsel made on the trial, produced a letter and delivered it to the latter, who read it, but did not offer it in evidence. Thereupon, on demand of the plaintiff's counsel, the court directed the defendant's counsel to put it in evidence, and in obedience to such direction, to which the defendant's counsel excepted, the letter was read to the jury.

When the case came to this court on appeal by the

defendant, this ruling was challenged as erroneous. The court so decided, HAIGHT, J., saying: "Whatever may have been the ancient rule in England upon the subject, we do not understand that the ruling of the court can be sustained under any rule now existing in England or in this state." But the court being of opinion that the letter did not prejudice the defendant, affirmed the judgment. It is claimed that the decision upon the point of the admissibility of the letter was unnecessary, and therefore is not binding. The question was properly raised and was decided. Its decision naturally preceded the decision of the subsequent question, and the declaration of the court was not *obiter*.

We think, moreover that the decision in the case accords with the view which has prevailed in the
[3] courts of this state and the practice of the profession.

In Lawrence *v.* Van Horne (1 *Caines*, 276) the
[4] defendant gave notice to the plaintiff to produce on the trial a certain letter, which the plaintiff refused to do unless the defendant would engage to read it in evidence. The defendant claimed the right to inspect the letter before deciding whether he would read it in evidence. The judge ruled that inspection could not be demanded except on the terms which the plaintiff imposed. On appeal one of the judges was of the opinion that the ruling was right and that the court could not compel the production of a paper for inspection only. But the question was not decided.

[5] In Kenny *v.* Clarkson (1 *Johns.* 385), SPENCER, J., said: "I must not be understood as sanctioning the course adopted at the trial in admitting the paper to be read without proof, because notice had been given to produce it and it had been called for and perused. The case of Lawrence *v.* Van Horne (1 *Caines*, 276) settles nothing, the then chief justice expressing no decided opinion on the question, and the rest of the court were

equally divided. It appears to me that the notice to produce a paper and calling for its inspection ought to be considered as analogous to a bill for discovery, where most certainly the answer is not evidence but for the adverse party. I think it is our duty to adopt such a course as will not needlessly drive parties into equity for discovery."

The doctrine announced by Judge SPENCER has, so far as our reports show, been acquiesced in by the courts and the bar of the state without question until a recent period.

[6] The English rule has not been uniform. Lord KENYON, in Sayer *v.* Kitchen (1 *Esp.* 209), held that production of a paper on notice did not make it evidence. The rule seems to have been held other-

[7] wise by Lord DENMAN, in Calvert *v.* Flower (7 *Car. & P.* 386), and in two or three other *nisi prius* cases, but without any special examination.*

The courts of Pennsylvania and New Hampshire held the view that production and inspection alone do not make the paper evidence (Withers *v.* Gillespy, 7

[8] *Ser. & Raw.* 10; Austin *v.* Thomson, 45 *N. H.* 113). GIBSON, J., in Withers *v.* Gillespy, referring to the practice on bills of discovery, says: "The reasons drawn from analogy render the argument almost insuperable." The New Hampshire case was decided upon an elaborate examination of the English and American authorities and contains the most thorough opinion on the question to be found in the books.

The courts of Massachusetts, Maine, and Delaware seem to have followed the supposed English rule on the subject. It was said in the earliest case in Mas-

[9] sachusetts on the subject (Com. *v.* Davidson, 1 *Cush.* 33) that it was a mooted point whether

* See Wharam *v.* Routledge (5 *Esp.* 235), holding that a paper produced pursuant to notice and examined becomes evidence.

calling for the books of the opposite party and inspecting them, and doing nothing more, makes the books evidence; but in Clark *v.* Fletcher (1 *Allen*, 53) the point was decided. In Maine (Blake *v.* Russ, 33 *Me.* 360) the question was decided without assigning any reasons, and the ruling in the Delaware case (Randall *v.* Chesapeake Co., 1 *Har.* 284) was made on the trial, and, so far as appears, without any examination.

The authorities on the question are divided; but we perceive no reason for departing from the rule as
[10] understood in this state. The claim that it gives the party calling for a paper an unfair advantage if he may inspect it and then decline to put it in evidence, seems to us rather specious than sound. The same objection would lie in case of bills for discovery, but it was the settled rule that an answer, though under oath, was evidence only for the party who obtained it. The party who has in his possession books or papers which may be material to the case of his opponent has no moral right to conceal them from his adversary. If on inspection the party calling for them finds nothing to his advantage, his omission to put them in evidence does not prevent the party producing them from proving and introducing them in evidence if they are competent against the other party.

The party calling for books and papers would be subjected to great hazard if an inspection merely, without more, would make them evidence in the case.

That rule tends rather to the suppression than the ascertainment of truth, and the opposite rule is, as it seems to us, better calculated to promote the ends of justice. The production of books and papers on notice is the voluntary act of the party. If he refuses, it may, as is claimed, authorize the other party to give secondary evidence of their contents, which the party having possession cannot then answer by producing them. But if they contain facts favorable to the other side, they ought

to be disclosed; and if production is refused, the party refusing may justly incur the danger of having secondary proof given of their contents.

The claim is also made that the books were competent as original evidence of the entries under the
[11] rule making books of account in certain cases evidence in favor of the party keeping them. We think there is no foundation for this contention.

The rule which prevails in this state (adopted, it is said, from the law of Holland), that the books of
[12] a tradesman or other person engaged in business, containing items of account, kept in the ordinary course of book accounts, are admissible in favor of the person keeping them against the party against whom the charges are made after certain preliminary facts are shown, has no application to the case of books or entries relating to cash items or dealings between the parties.

This qualification of the rule was recognized in the earliest decisions in this state, and has been main-
[13] tained by the courts with general uniformity (Vosburgh v. Thayer, 12 *Johns.* 461).* It stands upon clear reason. The rule admitting account-books of a party in his own favor in any case was a departure from the ordinary rules of evidence. It was founded upon a supposed necessity, and was intended for cases of small traders who kept no clerks, and was confined to transactions in the ordinary course of buying and selling or the rendition of services. In these cases some protection against fraudulent entries is afforded in the publicity which to a greater or less extent attends the manual transfer of tangible articles of property or the rendition of services, and the knowledge which third persons may have of the transactions to which the entries relate.

But the same necessity does not exist in respect to cash transactions. They are usually evidenced by notes,

*See also Case v. Potter, 8 *Johns.* 211; Low v. Payne, 4 *N. Y.* 247.

or writing, or vouchers in the hands of the party paying or advancing the money.

Moreover, entries of cash transactions could be fabricated with much greater safety and with less chance of the fraud being discovered than entries of goods sold and delivered, or of services rendered.

It would be unwise to extend the operation of the rule admitting a party's books in evidence beyond its present limits, as would be the case, we think, if books containing cash dealings were held to be competent.

Parties are now competent witnesses in their own behalf. A resort to books of account is thereby rendered unnecessary in the majority of cases.

We think the ledger was erroneously admit-
[14] ted in evidence, and the judgment below should, therefore, be reversed and a new trial ordered.

All concurred except MAYNARD, J., taking no part.

KAEMPFER, RESPONDENT, *v.* GORMAN, AS SHERIFF, ETC., APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; FEBRUARY, 1892.

§§ 887 *et seq.*

Commission—when open not granted.

An open commission should not be granted except under exceedingly peculiar circumstances, as by such commission frequently the place of trial is virtually transferred to a foreign jurisdiction.

In an action for trespass committed within this state, the defendant will not be permitted to examine witnesses without the state orally simply because the witnesses proposed to be examined are hostile to him.

Parker v. Lythgoe (13 *N. Y. Supp.* 949) distinguished.

(*Decided February* 18, 1892.)

Appeal by the defendant from an order of the New York county special term in so far as it denied a motion for an open commission.

The facts are stated in the opinion.

Abraham L. Jacobs (*W. L. Stillings*, attorney), for defendant, appellant.

Benno Loewy, for plaintiff, respondent.

VAN BRUNT, P.J.—It is apparent that an open commission should not be granted except under exceedingly peculiar circumstances, because, by such a commission, frequently the place of trial is virtually transferred to a foreign jurisdiction.

The papers in this case present no special reasons for the granting of such extraordinary relief, except the fact that the witnesses proposed to be examined are hostile to the defendant, and that, therefore, it is necessary to examine them orally.

Where a party is called upon to justify against a trespass committed within this state, we do not think that the plaintiff should be required to attend by counsel the taking of testimony in another state, and that the ordinary means of taking the testimony of witnesses should be resorted to, and not an open commission.

The case of Parker *v.* Lithgoe (13 *N. Y. Supp.* 949) is cited as an authority to support the application in question. Upon an examination of that case, it will be seen that it is no authority whatever for the contention

of the defendant. It is simply in harmony with the cases of Clayton *v.* Yarrington (16 *Abb. Pr.* 273) and Anderson *v.* West (9 *Abb. Pr. N. S.* 209).

In the case of Parker *v.* Lithgoe a commission had been ordered, and an appeal taken from the order granting the commission. The court was of opinion that the commission should issue; but they gave the right to the opposite party, if they desired, to have an open commission, in order that they might produce such witnesses as they chose, and examine them orally. If they did not desire an open commission, they were under no necessity to accept it; and, if the respondents did not desire that the defendants should have this privilege, then the appellants could not get it, unless they persisted in their motion for a commission.

In the other cases cited, leave was given to cross-examine witnesses orally where a commission had been issued, and that was all.

It will thus be seen that the question as to the oral examination of witnesses has in all cases depended upon the desire of the party moved against; and this court, at least, has not ordered any such commission, simply because it was more convenient and considered desirable by the party moving.

The order should be affirmed, with $10 costs and disbursements.

PATTERSON and O'BRIEN, JJ., concurred.

FROMME, APPELLANT, *v.* LISTLER, RESPONDENT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM: FEBRUARY, 1892.

§§ 803 *et seq.*

Inspection of documents—affidavit when insufficient—showing merits.

The petition or affidavit upon which an application is made for the inspection of an instrument should be made by the party to the action on whose behalf the claim is made, or his failure to make it should be sufficiently excused; it is not sufficiently excused by the mere fact that he does not reside in the county where his attorney resides.

On an application by the defendant for an inspection of a document, he must show merits.

(*Decided February* 18, 1892.)

Appeal by the plaintiff from an order of the New York county special term allowing the defendant an inspection of an alleged copy of a contract referred to in the complaint and said to be in the possession of the plaintiff.

The facts are stated in the opinion.

Abraham L. Fromme, for plaintiff, appellant.

Horwitz & Hershfield, for defendant, respondent.

VAN BRUNT, P.J.—The complaint alleges in substance that by an instrument in writing the assignor of the plaintiff was employed to procure a purchaser for certain

property, and that therein a certain compensation was promised; that a purchaser was procured and the compensation earned; and that prior to the commencement of the action an assignment of the claim was made, and judgment is prayed for.

The defendant, before answer, made a petition asking for an inspection of the agreement. The petition was sworn to by the attorney, and not by the defendant, and simply alleged that the agreement was not set forth in the complaint; that it related to the merits of the action, and was indispensable to the deponent for the preparation of the answer; that the agreement is in the possession of the plaintiff or his attorney, and the attorney has been requested to allow the deponent to inspect the same, which was refused; that deponent had no copy of said instrument in his possession, and is informed by the defendant that he has no copy thereof, and does not know the terms and conditions thereof, or whether the plaintiff has performed the same as alleged in the complaint. In the jurat of the petition it is stated that the reason the attorney makes the affidavit is that defendant does not reside in the city and county of New York, where deponent resides, but that defendant informed deponent that he had no copy of the instrument, and does not know the terms and conditions thereof. No affidavit of merits accompanies the papers, and upon this petition an order was granted for the inspection, and from such order this appeal is taken.

In the first place there is no sufficient reason why the affidavit was not made by the defendant. The mere fact that the defendant does not reside in the city and county where the attorney resides is no ground whatever for accepting an affidavit from the attorney. The statement might be entirely true, and the defendant have been in the company of the attorney when he made the affidavit. In applications of this character the person to make the affidavit is the party to the action; and there must be

some good ground presented to the court in order that the absence of his oath can be excused. The mere fact that he does not reside in the county where the attorney resides is not sufficient. It would be very convenient for a party, simply because he resides in another county, to get rid of the chances of being indicted for perjury by having his attorney make his affidavit for him upon declarations not made under oath. Something must be shown to demonstrate the impossibility of getting the affidavit of the client, and something more than the mere statements of the client, to justify any of these remedies.

And, furthermore, the papers do not show that there are any merits upon the part of the defendant, nor that he has any defence. The petition was entirely insufficient, and the order should have been denied.

The order should be reversed, with $10 costs and disbursements, and the motion denied.

PATTERSON and O'BRIEN, J.J., concurred.

MELLENS, APPELLANT, *v.* MELLENS *et al.*, A. C. AND M. H. ELLIS, RESPONDENTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; FEBRUARY, 1892.

§ 531.

Bill of particulars—when not ordered in action for professional services.

Where, upon a motion for a substitution of attorneys in an action for partition, the motion was granted upon the giving of a bond conditioned for the payment of whatever amount might be

found due the attorneys superseded, and a reference was ordered to take proof of the value of their services,—*Held*, that an application made before such reference was brought to a hearing for a bill of particulars of the attorneys' claim was properly denied, such particulars being generally stated in the affidavits which were furnished by them in the proceedings, and it appearing that the parties would be fully informed of the particulars of the claim on the hearing of the reference.

(*Decided February* 18, 1892.)

Appeal by the plaintiff from an order of the New York county special term denying a motion for a bill of particulars of the respondents' claim.

The facts are stated in the opinion.

Henry Daily, Jr., for plaintiff, appellant.

Cephas Brainerd, for respondents.

VAN BRUNT, P.J.—The respondents, as attorneys for the plaintiff, commenced this action for the partition and sale of certain real estate. They remained her attorneys until July, 1889, when the appellant discontinued their services and moved for a substitution. This motion the respondents resisted, but it was granted on condition of the plaintiff giving a bond, in $2000, conditioned for the payment of whatever amount might be found due to the respondents, and a reference was ordered to take proof of the services alleged to have been rendered in and about this action.

Before the matter was brought to a hearing, this motion was made for a bill of particulars of the claim of the respondents for professional services alleged by them to have been rendered for the plaintiff, and of the disbursements made for her in and about this action. This was denied upon the ground that they would have ample opportunity before the referee to ascertain the particulars of the respondent's claim.

We see no reason for interfering with this order. The services which the respondents claimed to have rendered were in and about this action, and none other. They have stated, generally, the nature of those services, in the affidavits which have been furnished by them in these proceedings, and they will be required to prove before the referee the services rendered, and their value; and the plaintiffs will have an opportunity to cross-examine the respondents in respect to the services so rendered. They will then be fully informed of the particulars of the respondents' claim, and will undoubtedly be afforded a reasonable opportunity to meet the claim, if they have any evidence whatever to adduce in opposition thereto.

The order should be affirmed, with $10 costs and disbursements.

PATTERSON and O'BRIEN JJ., concurred.

MATTES *v.* PAUSE AND ANOTHER.

NEW YORK COURT OF COMMON PLEAS, SPECIAL TERM; MARCH, 1892.

§§ 3228, 3347.

Cost—award of, by what statute governed in action removed to court of common pleas from district court.

The provisions of the Code of Civil Procedure respecting costs in the supreme court, the superior city courts, the marine court of the city of New York, and the county courts, apply to actions tried in one of said courts, and are not limited to actions commenced in one of such courts and triable therein.

Mattes *v.* Pause.

In an action brought in a district court in the city of New York to recover damages for a personal injury and removed to the court of common pleas, wherein the plaintiff recovers less than $50, the defendants are entitled to costs.

Druckermiller *v.* Shoninger (15 *Daly*, 477), Latterman *v.* Fere (11 *N. Y. Civ. Pro.* 217), Saulter *v.* Parkhurst (2 *Daly*, 240), distinguished; Kaliski *v.* Pelham Park R. R. Co. (20 *N. Y. Civ. Pro.* 315), Ruger *v.* Fayh's Watch Co. (20 *Id.* 204), followed.

(*Decided March* 26, 1892.)

Motion by plaintiff for a new taxation of the costs taxed in favor of the defendants.

This action was originally brought in the district court in the city of New York for the fourth judicial district to recover $250 damages for injuries alleged by the plaintiff to have been sustained by him through the negligence of the defendants, and was removed to this court on the application of the defendants. The plaintiff recovered $25, and the defendants' costs were taxed at the sum of $112.75 by the clerk of this court.

John Fennell, for the plaintiff and motion.

B. Lewinson, for the defendants, opposed.

GIEGERICH, J.—The provisions of the Code of Civil Procedure respecting costs (chap. 21, titles first, second, and third) apply to actions tried in one of the courts specified in subdivision 4 of § 3347, namely, the supreme court, a superior city court, the marine court of the city of New York, or a county court (*Code Civil Procedure*, § 3347, subdiv. 13), and are not limited to actions commenced in one of such courts and triable therein (Combs *v.* Combs, 25 *Hun*, 279, reversing 1 *N. Y. Civ. Pro.* 298; s.c., 62 *How.* 304).

It follows that the costs of this action, which was originally brought in a district court of this city to recover damages for a personal injury and removed to

this court, must be awarded and taxed pursuant to the above-cited provisions of the Code.

The cases cited by the learned counsel for the plaintiff, namely, Druckermiller *v.* Shoninger (15 *Daly*, 477), Latterman *v.* Fere (11 *N. Y. Civ Pro.* 217), Salter *v.* Parkhurst (2 *Daly*, 240), have no application, as they merely relate to the status of an action commenced in a district court after its removal to this court.

The plaintiff having recovered less than $50, the defendants are entitled to costs (Kaliski *v.* Pelham Park R.R. Co., 20 *N. Y. Civ. Pro.* 315 [DALY, C.J.]; Ruger *v.* Fayhs Watch Co., 20 *Id.* 204).

The application of the plaintiff for a retaxation of the costs must therefore be denied.

BURNS, RESPONDENT, *v.* DELAWARE, LACKAWANNA & WESTERN R. R. CO., APPELLANT.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL TERM; JANUARY, 1892.

§ 3234.

Costs—when both parties to action not entitled to.

Where a complaint stated three distinct causes of action and was dismissed upon the trial as to two of them, and the plaintiff had a verdict in his favor upon the third, which was sufficient to entitle him to costs,—*Held*, that the plaintiff alone should recover costs, and that costs should not be taxed in favor of the defendant, because the complaint had been dismissed as to the two causes of action; that it could not be assumed that a verdict in favor of the defendant instead of a dismissal would have been granted if asked for, upon said two causes of action.

A defendant is entitled to costs under section 3234 of the Code of

Civil Procedure only upon a decision in his favor upon an issue of fact.

The word "recover" as used in Code Civ. Pro., § 3234, means a decision upon a question of fact which unreversed is conclusive upon the parties in respect to the issue presented.

Newell Universal Mill Co. *v.* Muxlow (17 *N. Y. Civ. Pro.* 238); Fischer *v.* Dougherty (42 *Hun*, 167); Cooper *v.* Jolly (30 *Hun*, 224) followed; Blashfield *v.* Blashfield (42 *Hun*, 249) not followed.

(*Decided January* 22, 1892.)

Appeal by the defendant from an order of the Livingston county special term denying a motion made by it for a new taxation of plaintiff's costs, and that a bill of costs be adjusted in favor of the defendant.

The facts are stated in the opinion.

Charles H. Bissell, for defendant, appellant.

E. A. Nash, for plaintiff, respondent.

MACOMBER, J.—This appeal involves the application, in respect to costs, of section 3234 of the Code of Civil Procedure, where, under certain conditions, each party is entitled to costs against his adversary.

Three causes of action are stated in the complaint. The first is, that the defendant, in disregard of its duties as a common carrier, neglected to transport from Leicester, Livingston county, New York, to Cincinnati, in the state of Ohio, ninety-three barrels of pears, which were delivered to it on the 26th day of September, 1887.

The second cause of action is, that the defendant received from the plaintiff, on the 16th day of September, 1887, 169 barrels of pears under a contract to deliver them at Pittsburg, in the state of Pennsylvania, and in neglect of its duties as a common carrier failed to transport this property to its place of destination.

The third cause of action is, that on the 3d day of November, 1887, the defendant received from the plaintiff, at the same place, for transportation to Quincy, Illinois, forty-seven barrels of apples, but through neglect of duty, as aforesaid, failed to deliver them.

Judgment was prayed for the aggregate amount of the damages stated for the three causes of action, namely, $516.10, with interest upon the several items. The answer of the defendant put in issue all of the allegations of the complaint except the incorporation of the defendant and the fact of its receipt of the fruit mentioned, and alleges affirmatively that its duties ceased when such property had been transported by it to East Buffalo, N. Y. At the trial an effort was made in behalf of the plaintiff to prove each of the causes of action. A motion for a nonsuit in respect to the third cause of action was made by the defendant at the close of the plaintiff's case and granted. Upon a like motion at the close of all the evidence in the case, the court granted a nonsuit in respect to the second cause of action. The issue relating to the first cause of action was, upon the evidence, submitted to the jury, and a verdict rendered by it sufficient to carry costs to the plaintiff, if such claim had been the only cause of action stated in the complaint.

The attorneys for the respective parties appeared before the county clerk on May 11, 1891, and each presented a bill of costs for taxation, and each objected to the bill of costs made by the other side. A special objection was made by the defendant to an item of thirty dollars for taking the depositions of three witnesses in Pittsburg, together with an item of $14.50 for commissioners' fees in taking such depositions, upon the ground that such expenditures were made in the case of the alleged failure to deliver the property at Pittsburg, under which count the plaintiff had been nonsuited. The clerk taxed the costs in accordance with the contention made by the

plaintiff, and, on review of it at special term, such taxation was affirmed, and from the order allowing such costs to the plaintiff, and refusing to allow any costs to the defendant, this appeal is taken.

It is quite true that the language of the section is plain and unambiguous, as was stated by the court in Newell Universal Mill Co. *v.* Muxlow (17 *N. Y. Civ. Pro.* 238); yet not a little difficulty has been encountered by the courts in applying its plain provisions to the great variety of cases which have arisen since its enactment. Certain things are stated as conditions precedent to the allowance of correlative bills of costs, and they are, first, that the causes of action, if two or more of them are contained in the complaint, shall be set forth separately, and that an issue of fact should be joined on each of them. These conditions existed in the present case; for there are three causes of action set forth in the complaint, separately stated, upon each of which an issue of fact was joined by the answer. The plaintiff recovered upon one issue only, and the defendant obtained a nonsuit in respect to the other two causes of action.

But there is another condition for the allowance to the defendant of costs under this section, and that is, that he shall "recover" upon one or more of the causes of action set forth in the complaint. Upon this subject, it would not be conducive to a clear understanding of the case to cite any authority where all of the conditions above mentioned did not substantially exist.

In the case of Fisher *v.* Dougherty (42 *Hun*, 167) the point seems to have been distinctly held that where a nonsuit was granted in respect to certain counts contained in the complaint, and where no finding of fact was made either by the jury or by the court thereon, and there was a recovery had by the plaintiff upon other counts, there could not be taxed, in behalf of the defendant, costs in respect to the counts upon which a nonsuit

had been granted. See, also, Cooper *v.* Jolly, 30 Hun, 224. Under these two authorities, the case of Blashfield *v.* Blashfield, 41 Hun, 249, where the question is differently presented, cannot prevail.

The meaning of the word "recover," used in this section, clearly contemplates a decision upon a question of fact, which, if allowed to remain unreversed, is conclusive upon the parties in respect to the issue there presented. In this case there has been no finding upon a question of fact which would preclude the plaintiff, upon certain terms, to bring as a matter of right another action to recover damages upon the second and third causes of action stated in his complaint. Had there been a verdict in respect thereto, whether directed by the court or rendered by the jury, there would, in our judgment, be presented an entirely different question. Then a condition of things would have been brought about whereby, unless such decision was reversed, it would be impossible for the plaintiff again to present for trial the issues there made.

The learned counsel for the appellant has made an ingenious argument to the effect that this could not make any difference with the rule, because, in all probability, if he had made a motion for a direction of a verdict instead of a motion for a nonsuit, it would have been granted. We do not so understand the case. There is nothing contained in the record before us which would show that it would have been proper or likely that the court would have granted a direction of a verdict. The decision made at the instance of the defendant's counsel in respect to the second and third causes of action was simply that there was, at present, insufficient evidence to submit that question of fact to the jury. We have no right to assume that the learned justice at the circuit would have directed a verdict, any more than we would have a right to assume that the jury itself would have rendered a verdict for the defend-

ant upon these two issues. It is only upon a decision in favor of the defendant upon an issue of fact that he is entitled to recover costs under this section. This is *conditio sine qua non.*

We think, therefore, that the order appealed from was in accordance with the authorities, and should be affirmed.

Judgment and order appealed from affirmed, with ten dollars costs and disbursements.

DWIGHT, P. J., and LEWIS, J., concurred.

FISHER *et al.*, APPELLANTS, *v.* FISHER *et al.*, RESPONDENTS.

COURT OF APPEALS; JANUARY, 1892.

§ 834.

Privileged communication—to what physician may testify.

A physician may properly testify to the mental condition of one whom he has attended and prescribed for professionally, and whom he has also frequently seen when not professionally attending her if he excludes from his mind when so doing any knowledge or information he obtained as to her condition while acting as her medical attendant, and confines his testimony to such knowledge and information as he obtained of her by seeing her when she was not his patient.

A physician is prohibited from disclosing information obtained by him, as to his patient's condition, only where it is acquired in attending the patient in a professional capacity; the prohibition does not apply to information obtained by him in any other way.

Fisher v. Fisher (30 *St. Rep.* 363; s. c., 9 *N. Y. Supp.* 4; 55 *Hun*, 610 *mem.*) affirmed.*

(*Decided January*, 1892.)

Appeal by plaintiffs from a judgment of the general term of the supreme court in the second department affirming a judgment of the Westchester county special term in favor of the defendants.

The facts sufficiently appear in the opinion.

Martin J. Keogh, for plaintiffs, appellants.

Isaac N. Mills, for defendant, respondent.

EARL, J.—This is an action of partition brought by the plaintiffs to partition lands alleged in the complaint to belong to the parties to the action as tenants in common. The main controversy upon the trial was over a deed executed by Eliza Fisher on the 11th day of April, 1888. The title of the plaintiffs and of some of the defendants to a portion of the lands sought to be partitioned depended upon the validity of that deed. Some of the defendants claimed that it was procured by fraud and undue influence, and that therefore it was void and inoperative. Upon that question considerable evidence was given upon both sides; and the trial judge found that the deed was procured by improper influence, and that therefore it was void and inoperative.

We have carefully scrutinized the evidence, and see no reason to doubt that the conclusion of the trial judge was abundantly supported, and that his judgment thereon should not be disturbed.

There were no facts or circumstances in the case

* The general term opinion treats primarily the question of fact. It is reported in full in 30 *St. Rep.* 363 and 9 *N. Y. Supp.* 4, but merely the fact of the decision is stated in 55 *Hun*, 610.

which estopped the parties assailing that deed from claiming its invalidity.

Upon the trial Doctor Curtis was called to give evidence as to the mental condition of Eliza Fisher at or about the time when she executed the deed. It appeared that he had attended and prescribed for her professionally, and that he had also seen her at various times when he was not in attendance upon her for the purpose of treating her professionally. He was asked various questions as to her mental condition, excluding from his mind in answering the questions any knowledge or information which he had obtained as to her condition while acting as her medical attendant, and confining his answers to such knowledge and information as he had obtained of her by seeing her when she was not his patient. Counsel for the plaintiffs objected to the competency of the witness under § 834 of the Code. The court overruled the objection, and the witness was permitted to answer, and he gave material evidence as to the mental condition of Eliza Fischer. In this there was clearly no error (Edington *v.* Ætna Ins. Co., 77 *N. Y.* 564; People *v.* Schuyler, 106 *Id.* 304; Hoyt *v.* Hoyt, 112 *Id.* 515).*

* That there must exist a professional employment before there can be a professional privilege was held with respect to an attorney in Haulenbeck *v.* McGibbon (20 *N. Y. Civ. Pro.* 406), Sheldon *v.* Sheldon (33 *St. Rep.* 754; s., c. 11 *N. Y. Supp.* 477), Brennan *v.* Hall (20 *N. Y. Civ. Pro.* 434).

The same rule was applied to testimony relating to communications to a physician in Renihan *v.* Dennin (103 *N. Y.* 573, affg. 38 *Hun*, 270), Grossman *v.* Supreme Lodge K. and L. of Honor (6 *N. Y. Supp.* 821), Matter of Freeman (46 *Hun*, 458), Stowell *v.* Amer. Co-op., etc., Assn. (23 *St. Rep.* 706; s. c., 5 *N. Y. Supp.* 233), Burley *v.* Barnhard (9 *St. Rep.* 587), Heath *v.* Broadway & Seventh Ave. R. R. Co. (29 *St. Rep.* 267; s. c., 8 *N. Y. Supp.* 863; 57 *Super. Ct.* 496), People *v.* Kremmler (119 *N. Y.* 580), Henry *v.* N. Y., Lake Erie & W. R. R. Co. (19 *N. Y. Civ. Pro.* 188).

The communication made to an attorney must have been confi-

The prohibition of that section applies only to information the physician acquired in attending the patient in a professional capacity, and it does not apply to information obtained by him in any other way.

The judgment should be affirmed, with costs.

All concurred.

WESTON, APPELLANT, *v.* STODDARD, RESPONDENT.

SUPREME COURT, THIRD DEPARTMENT, SPECIAL TERM, SEPTEMBER, 1891, AND GENERAL TERM, DECEMBER, 1891.

§§ 968, 3228, 3229.

Costs—award of, in action for partition.

An action for the partition of real property is an equitable one, and although an issue of fact therein is triable by jury, that does not make the action so triable or bring it within the provision of section 3228, subdivision 1, giving a plaintiff costs in certain cases, but the costs are in the discretion of the court, and may be awarded to the plaintiff and the defendant.

Henderson *v.* Scott (43 *Hun*, 22) followed; Davis *v.* Davis (3 *St. Rep.* 163) not followed.

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dential to have made it privileged (Smith *v.* Crego, 54 *Hun*, 22; Matter of McCarthy, 55 *Id.* 7; Bartlett *v.* Burne, 56 *Id.* 507).

In the case of a physician, it must have been made to enable him to act professionally (Matter of Freeman, 46 *Hun*, 458; Hoyt *v.* Hoyt, 112 *N. Y.* 493; Matter of O'Neil, 26 *St. Rep.* 242; s. c., 7 *N. Y. Supp.* 197).

Where knowledge was acquired by a physician, partly professionally and partly while making friendly visits, and he was unable to separate what was acquired in the different capacities, his testimony was excluded (Matter of Darragh, 52 *Hun*, 591, rev'g s. c., 15 *St. Rep.* 452).

Weston v. Stoddard.

Instance of an action for the partition of real property in which costs were properly awarded both plaintiff and defendant and charged upon the shares of the parties in fault.

(*Decided at special term, September*, 1891; *at general term, December*, 1891.)

Application at special term for costs and allowances in an action for partition.

The facts are stated in the opinion.

Winsor B. French, for plaintiff.

Charles S. Lester, for defendant.

KELLOGG, J.—This is an action for partition. Actual partition of the property described in the complaint was directed, and has been made by the commissioners. The total value of the property is conceded to be $10,000. The complaint alleges that Mary R. Stoddard is the owner of three fourths. The complaint also alleges that there are no incumbrances or liens of any nature upon the property. The defendant, Mary R. Stoddard, served an answer claiming, among other things, that she was the owner of a mortgage for $1000 given in 1855 upon the other one fourth interest as the purchase-money of the same. It is clear that she was called upon by the allegation in the complaint above mentioned to make this defence in order to protect her lien by way of mortgage upon this one-fourth interest. The findings of the special term are to the effect that this mortgage was given as alleged in the answer, and no part of it has been paid. As to the issue raised by the reply to that portion of this defendant's answer, namely, that the said mortgage was invalid by reason of the statute of limitations, or was a stale mortgage, the court declined to determine, leaving the owner of said mortgage unprejudiced

by this partition to make her claim for payment in the ordinary way by foreclosure.

In so far as this part of the answer of Mary R. Stoddard is concerned, she has prevailed in the action. As to the other portions of her answer she has failed. It would seem proper that in the determination as to costs she should be entitled to the usual costs for having succeeded upon a single separate count in her answer.

The plaintiff in this case has succeeded, however, upon all other issues raised by the answer, and has been put to unnecessary expense in making his proof and establishing his claim as alleged in the complaint to the one-fourth of this property. Such expense was necessarily large before the trial justice; and, appeal having been taken therefrom to the general term, it would seem that the question had been contested unreasonably by the defendant, Mary R. Stoddard, having once before been decided by the general term in this district. I have come to the conclusion, therefore, that the plaintiff is entitled to full costs as in partition cases, for the trial before Justice Putnam, and that his costs and disbursements should be taxed as provided by the Code by the clerk of the county of Saratoga; and that in addition to the costs so taxed, the plaintiff is entitled to an additional allowance of two per cent on the value of the property, namely, $10,000; and that the costs so taxed, together with the said additional allowance, be paid, three fourths by the said Mary R. Stoddard, and one fourth by the owners of the remaining one fourth as fixed by the trial court; that the same be a lien on the property so allotted in the said proportions. Also, that the plaintiff shall be entitled to his costs and disbursements on the appeal to the general term; that the same be taxed by the said clerk, and shall be paid by the defendant, Mary R. Stoddard, and shall be a lien upon the portion allotted to her, and that plaintiff shall have an addi-

tional allowance of five per cent on the one fourth, namely, $2500, being the value of the property in dispute; and that such five per cent be also chargeable upon the said interest of Mary R. Stoddard, and shall be paid by her and be a lien upon the property allotted to her.

I have further determined that the defendant, Mary R. Stoddard, is entitled to her costs of the trial before Justice Putnam, to be taxed by the clerk of the said county, and that an additional allowance there should be paid to her of two per cent on the value of the said interest involved, to wit, $2500, and the same be chargeable against the owners of the said one-fourth interest in the said property and shall be paid by them, and at the election of the said Mary R. Stoddard the same may be offset against any costs herein allowed against her.

From so much of the order entered on this decision as allowed the defendant costs the plaintiff appealed to the general term of the supreme court in the third department.

Winsor B. French, for plaintiff, appellant.

Charles S. Lester, for defendant, respondent.

LEARNED, P.J.—The action of partition has long been an equitable remedy (1 *Story's Eq.*, § 646, and subsequent sections). There was also a special proceeding provided for by the Revised Statutes, which might be taken in courts of law. But that left, in express language, the jurisdiction of the court of chancery unaffected.

Such an action is not within section 968 or section 3228. It is governed by section 3230, and costs are in the discretion of the court. An issue of fact in the action is triable by a jury (§ 1544). But that does not determine that the action is so triable or bring the action within section 3228, subdivision 1.

The right to award costs to plaintiff and to defendant was recognized in Henderson *v.* Scott, 43 *Hun*, 22, and this must overcome the special term decision of Davis *v.* Davis, 3 *St. Rep.* 163.

We think, therefore, that the matter was in the discretion of the special term. And there is no question that the discretion was not properly exercised.

Order affirmed, with ten dollars costs and printing disbursements.

MAYHAM, J., concurred.

In re PROBATE OF THE WILL OF CORNELIA L. SCHRADER, DECEASED.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL TERM; JANUARY, 1892.

§ 2624.

Surrogate's court—jurisdiction of, to construe will.

The surrogate's court can exercise only those powers which are given to it by statute and such incidental powers as are required in the proper exercise of the powers expressly conferred; and unless a warrant for the exercise of its jurisdiction of a particular case can be found in the statute either expressly or by necessary implication, any judgment pronounced by it is void. [2]

Until the enactment of section 2624 of the Code of Civil Procedure the surrogate's court had no power on the probate of a will to determine the validity of any of its provisions or make any decree thereon, except either to admit it to or reject it from probate, save only under a separate statute relating exclusively to the surrogate's court of the county of New York. [3]

The jurisdiction of the surrogate court to make a construction of a will or pass upon the validity or effect of any part thereof

is confined to "any disposition of personal property" made thereby. [4]

Where the disposition of personal and of real property made by a will or a clause thereof are essentially connected and not separable, and there is no disposition of personal property except as it is connected with the disposing of real estate, the surrogate has no jurisdiction to make a construction of the will or pass upon the validity of any of its parts. [1, 5]

(*Decided January*, 1892.)

Appeal by J. Albert Schrader and Edward V. Schrader, next-to-kin and heirs-at-law of the decedent and legatees named in her will, from such parts of a decree of the surrogate court of Cayuga county admitting her will to probate as construed by the same.

The facts are stated in the opinion.

Teller & Hunt, for legatees, appellants.

C. G. Baldwin, for executors, respondents.

MACOMBER, J.—No question arises upon this appeal touching the sufficiency and proof of the will and of the disposing mind of the testatrix. The appellants at the time of the return of the citation filed an answer which put in issue the validity, construction, and effect of certain portions of the will, and went to trial thereon before the surrogate. Section 2624 of the Code of Civil Procedure provides as follows: "But if a party expressly puts in issue before the surrogate the validity, construction, or effect of any disposition of personal property contained in the will of a resident of the state, executed within the state, the surrogate must determine the question upon rendering a decree, unless the decree refuses to admit the will to probate by reason of a failure to prove any of the matters specified in the last section."

The surrogate has, by rejecting or ignoring the sec-

ond provision of the will, made a construction which the appellants deemed to be unfavorable to them.

[1] The first section of the will devised all of the property of the testatrix in this state, both real and personal, to trustees, under a trust for the payment of the rents and profits and interest to the appellants, who were her children, with a provision for the final payment of the principal over to them. The second item of the will was to the effect that if any of the testatrix's heirs should die, leaving a wife and children, and if, in the judgment of the trustees, the portion of the estate was "needed more for the maintenance and support of the other heir or heirs of my body, or their legal representatives, then my trustees shall retain the same in trust, as under firstly, or pay over the same to such heir or heirs, as hereinbefore stated, otherwise to be administered as under firstly of this instrument." By the third item it was provided that if her children "die leaving no heirs, then all my property and estate, both real and personal, shall be *divided*, share and share alike, to my surviving brothers and sisters, or their legal representatives." By the fourth provision she appointed two trustees of the will, namely, her sister, Mary C. Hale, and her brother, William Seward Hale. Mary C. Hale having died, William Seward Hale is the surviving executor and trustee under the will.

Without construing or determining the effect of these several provisions of the will in question, we are of the opinion that the surrogate did not have jurisdic-

[2] tion to make any construction of the will, or to declare any provision thereof valid or invalid. The surrogate's court is one of well-defined and limited, although of extensive jurisdiction. It can exercise only those powers which are given to it by statute and such incidental powers as are required to the proper exercise of the powers expressly conferred. Unless, therefore, a warrant for the exercise of its jurisdiction of the particu-

lar case can be found in the statute, either expressly or by necessary implication, any judgment pronounced by that tribunal is void (Riggs *v.* Cragg, 89 *N. Y.* 479; Seaman *v.* Whitehead, 78 *Id.* 308).

Until the enactment of this section of the Code of Civil Procedure the surrogate's court had no power, on the probate of a will, to determine the validity of [3] any of the provisions of the will, or to make any decree thereon, except either to admit it to or reject it from probate, save only that a special statute relating only to the surrogate's court of the county of New York (chapter 359 of the Laws of 1870), conferred such power.

The will before us is one of both real and personal property. The deceased, at the time of her death, owned a house and lot in Union Springs, in New York, and an interest in other real estate in the town of Elbridge, New York. Her personal property amounted to about $3000. It does not appear whether the personal estate would or would not be sufficient to pay her [4] debts. The jurisdiction of the surrogate, at the time the will was offered to probate, to make any construction thereof, or to pass upon the validity or effect of any part thereof, is confined to "any disposition of personal property." In this case there is no disposition of personal property, except as it is con- [5] nected with the disposition of the real estate of the testatrix. It would be impossible to separate the disposition of the personal property from that made of the real estate. They are essentially connected, and not separable. The surrogate himself finds that the will is one of both real and personal property, and he attempts to make no restriction of his construction, so as to confine it to the disposition made of the personal property alone. But we are of the opinion, under this section of the Code, and under the common-law limitation of the power of the surrogate's court, that the sur-

rogate had no jurisdiction to make a construction of this will or pass upon the validity of any of its parts, because there was no disposition of personal property independent of and separable from the disposition of the real estate.

It follows that so much of the decree as makes a construction of the will and passes upon the validity of any portion thereof should be reversed.

That part of decree appealed from reversed, with costs of appeal to both parties, payable out of the estate.

DWIGHT, P.J., and LEWIS, J., concurred.

EFFRAY, APPELLANT, *v.* MASSON, AS ADMINISTRATRIX, ETC., RESPONDENT.

CITY COURT OF NEW YORK, GENERAL TERM; DECEMBER, 1891.

§§ 1835, 1836, 3343.

Costs—award of, against executors or administrators in the city court of New York—City court of New York is not a superior city court.

Where in an action against an administratrix upon a debt owing by her decedent the plaintiff had a verdict in his favor, and thereupon entered judgment for the amount thereof, and costs, which he taxed upon notice, but without application to the court for costs,—*Held*, that while the including of the costs in a judgment was premature and irregular, and subject to be stricken out on motion, if the plaintiff can satisfy the court that he is entitled to them, in order to do substantial justice the court will disregard the irregularity.

Effray *v.* Masson.

Where a claim against an administratrix upon a debt owing by her decedent was duly presented to her and by her rejected, and no offer to refer made, the claimant upon recovering judgment in his favor in an action brought on the claim is entitled to costs, and in the city court of New York it is not necessary to obtain or present a statement of the facts certified by the judge before whom the trial took place.

The city court of New York is not a superior city court.

(*Decided December*, 1891.)

Appeal by the defendant from an order of the special term denying a motion to strike out of a judgment entered herein costs taxed in favor of the defendant.

The facts are stated at length in the opinion.

E. Huerstel, for plaintiff, respondent.

M. F. Finnegan, for defendant, appellant.

McCarthy, J. — This is an appeal from an order made by the Hon. Justice Fitzsimons, denying a motion made on behalf of the defendants to amend the judgment entered herein by striking out and disallowing the costs of the plaintiff inserted after a trial and recovery had in favor of plaintiff.

The plaintiff commenced an action against defendant in her representative capacity as administratrix, etc., of Mary Ann Thuillier, deceased, to recover a sum of money claimed to be due to plaintiff from the estate of said decedent. This action was at issue on complaint and answer, and was duly tried before Hon. Justice Van Wyck and a jury, at a regular trial term, and judgment rendered in favor of plaintiff with an extra allowance of five per cent.

The action was commenced after the due presentation to the administratrix, in pursuance of a notice published

by her requiring creditors to present claims within a specified time, and which claim of plaintiff had been duly presented and absolutely rejected by the administratrix.

After the trial the plaintiff duly served a bill of costs with due notice of taxation, and costs were duly taxed by the clerk, in pursuance of such notice, without objection from the defendant.

Judgment was thereupon entered against defendant in her representative capacity as administratrix on May 11th, the notice of taxation having been previously served on May 8th, and on said May 11th notice of the entry of judgment was duly served on appellant's (defendant's) attorney.

On May 15th defendant made a motion to set aside the verdict and judgment, and for a new trial of this action on the judge's minutes, which motion was duly heard and argued before the Hon. Justice VAN WYCK, before whom the trial was had and denied, with ten dollars costs to plaintiff, and thereafter the motion to amend said judgment by striking out the costs was made.

The including of costs in the judgment in this case without application to the court was premature and irregular, and subject to be stricken out on motion unless the plaintiff can satisfy the court that it comes within the requirements of section 1836, and authorities hereafter cited. When such appears, the court, in order to do substantial justice, will disregard the irregularity and grant the relief asked for. The defendant obtained on May 19, 1891, an order to show cause why an order should not be made requiring the clerk of this court to amend the judgment entered herein, by striking out all of the costs other than the actual disbursements taxed and entered herein. Upon the hearing of this motion the following papers besides the pleadings were presented:

[Title of case.]

On the annexed affidavit of Michael F. Finnegan, verified the 19th day of May, 1891, and upon all the proceedings heretofore had herein,

Let the plaintiff or her attorney show cause before me, or one of the justices of this court, at the chambers thereof, in the old City Hall, in the city of New York, on the 21st day of May, 1891, at ten o'clock in the forenoon, why an order should not be made requiring the clerk of this court to amend the judgment entered herein by striking out all costs other than the actual disbursements taxed and entered herein.

Service of a copy of this order and affidavit on the plaintiff's attorney on or before the 19th day of May, 1891, will be deemed sufficient service.

Dated N. Y., May 19, 1891. J. M. FITZSIMONS.
J. C. C.

[Title of case.]

CITY AND COUNTY OF NEW YORK, *ss.:*

Michael F. Finnegan, being duly sworn, says that he is the attorney for the defendant above named.

That this action was brought to recover the sum of $540 and interest for board and lodging, claimed to be due and owing from defendant's intestate at the time of her demise.

That on or about the 19th day of June, 1890, the plaintiff presented to defendant, as such administratrix, her claim for said board and lodging, which was promptly rejected.

That the plaintiff never offered to refer said claim, but immediately brought suit against defendant.

That on the trial of this action judgment was recovered against defendant for the sum of $540 and interest, and thereafter, and on the 11th day of May, 1891, the plaintiff's attorney improperly entered judgment, with costs, other than disbursements, without first obtaining

permission from the court, as required by the Code of Civil Procedure.

Wherefore deponent prays that an order may be made requiring the plaintiff or her attorney to show cause why an order should not be made requiring the clerk of this court to strike out the costs heretofore taxed in this action.

That no previous application has been made for this order.

M. F. FINNEGAN.

Sworn to before me this 19th day of May, 1891.

W. TAZWELL FOX,
Notary Public, N. Y. Co.

[Title of case.]

CITY AND COUNTY OF NEW YORK, *ss.:*

Edmund Huerstel, the plaintiff's attorney herein, being duly sworn, says: That a trial of this action was duly had on the 5th day of May, 1891, before Hon. Justice VAN WYCK and a jury, and a verdict rendered by direction of the court in favor of the plaintiff for the sum $639.80, and that an extra allowance of five per cent was granted by the justice to the plaintiff.

That thereafter, on the 8th day of May, 1891, deponent caused to be served on the defendant's attorney a bill of costs, with a notice of taxation for the 11th day of May, 1891, and that in pursuance of such notice the costs were duly taxed by the clerk at $93.91, and that defendant's counsel did not oppose or object to such taxation, and that on the same day judgment in this action was duly entered, and a copy of the same, with notice of its entry on the same day, served on the defendant's attorney.

That this action is brought to recover a claim against the estate of said deceased, which had been duly presented to the administratrix in pursuance of a notice of creditors to present claims published by said adminis-

tratrix, and upon presentation of which the same was rejected by a notice in writing signed by said administratrix, a copy of which said claim is annexed to the complaint in this action, and a copy of the rejection thereof is also hereto annexed.

That the administratrix made no offer in reference to this claim as provided by statute, and the deponent was thereupon retained to commence this action for the plaintiff.

That the judgment entered herein, including costs and extra allowance, is against the defendant in her representative capacity as such administratrix, and not against her individually.

That on the trial of this action the justice granted an extra allowance of five per cent to the plaintiff, to which defendant's counsel interposed no objection, and at the same time the justice, on the rendering of said verdict, directed in the minutes as follows, viz.: twenty days stay of execution after notice of entry of judgment, and thirty days to make a case.

That subsequently, on the 15th day of May inst., the defendant's attorney served a notice of motion to set aside the judgment and verdict, and for a new trial on the minutes, which motion was duly heard before Hon. Justice VAN WYCK at a trial term on May 19th inst., and an order was made and duly entered thereon denying the same, with ten dollars costs to the plaintiff; and on the same day the order to show cause in this present motion was served on deponent after an argument had before Hon. Justice VAN WYCK, and the eight days after notice of entry of judgment herein, and eleven days after service of notice of taxation of costs in this action had been served, as above mentioned.

EDMUND HUERSTEL.

Sworn to before me this 21st day of May, 1891.

WILLIAM J. GILROY,
Commissioner of Deeds, N. Y. Co.

"NOTICE OF REJECTION OF CLAIM.

"*June* 23, 1890.

"The within claim is hereby rejected for the reason that the same is an unjust and unlawful claim.

"MARIE E. MASSON,
"*Administratrix.*"

This then brought the whole question before the court as well as the question of irregularity. It is the same as if the motion was now made by plaintiff to allow the costs. The statements contained in the affidavit of plaintiff's attorney were not denied nor answered. This written rejection was absolute, and comes clearly within § 1836, Code Civil Procedure.

EARL, J., in Carter *v.* Beckwith (104 *N. Y.* 239; 5 *St. Rep.* 617), says: "After such an unqualified refusal the plaintiff was not bound to go further before commencing his action in order to entitle him to costs." *

* See King *v.* Todd (21 *N. Y. Civ. Pro.* 114), where Mr. Justice BOOKSTAVER at trial term of the court of common pleas said: "Sections 1835 and 1836 of the Code provide that costs shall not be awarded against an executor or administrator except upon the two following conditions, which must concur: (1) plaintiff's demand must be presented within the time limited by the published notice requiring creditors to present their claims; and (2) the payment of the claim has been unreasonably resisted, or that the defendant has refused to refer." He also held that an administrator cannot be charged with costs of an action against him upon a claim against his decedent, in which he is defeated, unless the claim was presented to him in writing within the time limited by the published notice requesting creditors to present their claims, and this although the claim was presented to him verbally before said time elapsed, and also notwithstanding he has refused to refer the claim.

In Clark *v.* Corwin (21 *N. Y. Civ. Pro.* 108) the general term of the supreme court in the second department says (per DYKMAN, J.), "The claim was presented to the counsel for the executors, and rejected, and sufficient was stated by him at the time to constitute a refusal to refer. It is unnecessary to determine whether the claim

It is not necessary to obtain or present a statement of the facts certified by the judge before whom the trial took place in this court. Section 3343, Code of Civil Procedure, declares what are superior city courts. This court is not one of them. The administratrix having been exempted from the payment of costs personally, and is not therefore injured, cannot be heard to complain of the absence of the certificate of the judge who tried the case (Meltzer *v.* Doll, 91 *N. Y.* 365).

The order should be affirmed, without costs.

EHRLICH, Ch. J., and MCGOWN, J., concurred.

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was unreasonably resisted, as the refusal to refer was sufficient to justify the imposition of costs."

In Healy *v.* Murphy (21 *N. Y. Civ. Pro.* 13) costs were refused where there had not been a refusal to refer, and the great reduction of the claim effected showed that the claim had not been unreasonably resisted.

A verbal offer to refer is sufficient (Lanning *v.* Swarts, 9 *How. Pr.* 434; Roberts *v.* Pike, 19 *N. Y. Civ. Pro.* 422).

Costs upon reference of claim against a decedent's estate are not governed by Code Civil Procedure, sections 1835, 1836 (Hallock *v.* Bacon, 21 *N. Y. Civ. Pro.* 255).

POOLE, APPELLANT, *v.* BELCHA, RESPONDENT.

COURT OF APPEALS; FEBRUARY, 1892.

§ 66.

Attorney's lien—when enforceable and how enforced.

The provisions of section 66 of the Code of Civil Procedure, giving an attorney a lien upon his client's cause of action or counterclaim for his services, does not prevent parties from settling and releasing judgments, suits, and proceedings; but if the release has the effect of depriving the attorney of his costs the court has the power to and should set it aside and protect the attorney's lien; it cannot, however, be assumed that a settlement is in fraud of the attorney's rights, and until the lien is asserted in some way, the judgment remains the property of the client.

To warrant the court in disregarding a settlement and release made in an action it must be shown that to give full effect to them will operate as a fraud upon the attorney, or at least to his prejudice, by depriving him of his costs or turning him over to an irresponsible client.

Lee *v.* Vacuum Oil Co. (126 *N. Y.* 579) followed.

Where after the settlement of an action between the parties the defendant's attorney moved to strike an appeal from the general term calendar and affirm the judgment, and the motion was granted because the attorney for the defendant asserted a lien for costs—*Held*, that so far as the order made affirmed the judgment it was erroneous and should be set aside, no fraud upon the attorney in the settlement having been shown that would justify the court in disregarding it.

(*Decided February*, 1892.)

Appeal by the plaintiff from an order of the general term in the third department striking an appeal from the calendar of that court and affirming a judgment entered in favor of the defendant.

The facts appear in the opinion.

James Coupe, for plaintiff, appellant.

Eugene E. Sheldon, for defendant, respondent.

O'BRIEN, J.—This is an appeal from an order of the general term striking an appeal to that court from the calendar, and affirming, with costs, a judgment for the defendant entered upon a verdict. The action was brought to recover certain specific personal property, which was delivered to the plaintiff at the commencement of the action. On the trial the plaintiff failed, and a verdict was rendered for the defendant. A motion was made by the plaintiff for a new trial on the minutes, which was denied June 24, 1887. The plaintiff appealed to the general term from this order July 23, 1887. Judgment was entered on the verdict December 1, 1887, but no appeal was taken from this judgment. October 25, 1887, the plaintiff served a proposed case containing exceptions, and subsequently amendments thereto were served by the defendant, but the case was not filed or certified, and no copy was served on the defendant's attorney. On an affidavit showing these facts the defendant's attorney gave notice of a motion to be made at the general term September 8, 1891, for an order striking the appeal from the calendar and for an affirmance of the judgment. The verdict upon which the judgment was entered was for $286.28, the value of the property as found by the jury. The motion to strike the cause from the calendar and affirm the judgment was met by an affidavit on the part of the plaintiff showing that on September 2, 1891, the plaintiff paid to the defendant $300 and settled the case; that upon such settlement it was agreed that each party should pay his own attorney, and thereupon the defendant executed and delivered to the plaintiff a general release under seal, a copy of which was attached to the

affidavit. It is as broad and comprehensive in its terms as words could make it. It releases and discharges all actions, causes of action, suits, debts, bonds, judgments, executions, controversies and demands whatsoever, in law or in equity, which the defendant then or ever had against the plaintiff or might have thereafter. This instrument was duly acknowledged, and the question is whether the general term under such circumstances could properly have made the order appealed from. The payment of the $300 by the plaintiff to the defendant and the execution and delivery of the release operated as between the parties at least to satisfy and discharge the judgment and to discontinue the appeal, unless the judgment and appeal notwithstanding the release is kept on foot by the provisions of section 66 of the Code. This section provides that "the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof in whosesoever hands they may come," and this lien cannot be affected by any settlement between the parties before or after judgment. This provision does not prevent parties from settling and releasing judgments, suits, and controversies. If the release has the effect of defrauding the defendant's attorney of his costs, the court has the power to and should set it aside and protect the attorney's lien. But there was nothing shown on the motion to lead the court to believe that the attorney needed any protection. For aught that appears, his client is able and willing to pay all his reasonable and proper charges, and if this is so why should the parties be prevented from settling the litigation in their own way? Neither the judgment nor the appeal should under the circumstances be kept alive after the release between the parties unless necessary for the protection of the attorney, and this is not claimed nor suggested.

In order to warrant the court in disregarding a settle-

ment and release made in an action, it must be shown that to give full effect to them will operate as a fraud upon the attorney, or at least to his prejudice, by depriving him of his costs, or turning him over to an irresponsible client. The record does not present any such question. The order appealed from was not made upon the theory of protecting any lien that the defendant's attorney had. It was made upon a motion to strike the cause from the calendar, and affirm the judgment, an ordinary proceeding in a cause in which the attorney represented only his client, and not any interest in the costs that he had himself.* For the purposes of this question the order must be treated as if it was obtained upon the application of the defendant in person after he had been paid the judgment, and had delivered the release. No one would then claim that he was entitled to proceed any further with the case. The lien secured to an attorney by section 66 of the Code does not prevent the party who owns the judgment from receiving payment thereof and executing a discharge. When it is shown that such payment or discharge will operate to deprive the attorney of his costs, the court has power to protect him, but it cannot be assumed that a settlement is in fraud of his rights. Until the lien of the attorney is asserted in some way the judgment remains the property of the client (Wehle *v.* Conner, 83 *N. Y.* 231). We have had occasion recently to pass upon this question in another case, Lee *v.* Vacuum Oil Co. (126 *N. Y.* 579). There the attorney not only had the statutory lien for costs, but by agreement was entitled to a part of the recovery. On the point now under consideration, RUGER, Ch.J., said: "We are of the opinion that the existence

* Before the attorney can proceed with an action that has been settled between the parties for the purpose of enforcing his lien he must secure leave of court (Washburn *v.* Mott, 19 *N. Y. Obs. Prs.* 439, and cases there cited).

of such a lien in favor of the attorneys does not confer a right on them to stand in the way of a settlement of an action which is desired by the parties, and which does not prejudice any right of the attorneys. We do not think that such an agreement deprives a party of the right to control the management of his own cause, and to determine when the litigation shall cease, and how far it shall be extended. The client still remains the lawful owner of the cause of action, and is not bound to continue the litigation for the benefit of his attorney when he judges it prudent to stop, providing he is willing and able to satisfy his attorney's just claims."

When it appeared that the plaintiff had paid the judgment, and the defendant had released him, in the absence of some showing that the attorney would be prejudiced by allowing the settlement to stand, the court should not have permitted any further proceedings in the cause. It follows that that part of the order which affirmed the judgment after payment and discharge of the same was erroneous, and should be reversed.

So ordered, with costs.

All concurred.

ESTATE OF MODERNO.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; FEBRUARY, 1892.

§ 2717.

Executors and administrators—petition for payment of debt.

The payment of a claim against a decedent may and in a proper case should be directed to the surrogate's court upon the petition of one to whom the claim has been assigned by the original creditor, presented persuant to the provisions of section 2717 of the Code of Civil Procedure.

(*Decided February* 18, 1892.)

Appeal by Adelaide O. Moderno from an order of the surrogate of New York county denying her application that a claim against the estate of the decedent, her husband, assigned to her be paid.

The facts appear in the opinion.

Antonia Knauth (*Briesen & Knauth*, attorneys), for petitioner, appellant.

VAN BRUNT, P.J.—This application was made by the widow of the decedent, claiming to be a creditor of his estate, for a decree directing the temporary administrator to pay certain claims set forth in her petition. A portion of the claims refer to expenditures made by petitioner for services rendered by third parties to decedent in his lifetime, such as hotel charges, nursing, etc., which were paid by her, and of which she became the

assignee. Another portion relates to amounts expended by petitioner for receiving-vault and funeral expenses, and another to expenditures in reference to proving satisfactorily the death of the decedent, and rendering assistance in and about the probate of the will. The surrogate refused to direct the payment of the claims of which the petitioner was assignee upon the ground that the assignee of a claim against a decedent has no standing in court under the Code, § 2717, to compel payment; and he also refused to allow the payment of the expenses in reference to the probate of the will upon the ground that the necessity of these expenditures was not stated, nor the particulars of the assistance rendered by the petitioner in and about proving the decedent's death and the probate of the will. From that portion of the surrogate's decree disallowing the assigned claims this appeal is taken. We think the learned surrogate erred in the construction of section 2717 of the Code, that an assignee of a claim against a decedent has no standing in court by reason of said section. The provision of the section is that a petition may be presented to the surrogate's court by a creditor for the payment of a debt against the estate at any time after six months have expired since letters were granted praying for a decree directing the executor or administrator to pay the petitioner his claim. The assignee of a claim is certainly a creditor of the estate. The language of the section does not limit it to original creditors, but to any person who at the time of filing his petition is a creditor of the estate; embracing, therefore, those who have acquired their claims by assignment, as well as those who were original creditors; there being no distinction between the position of an assignee of a claim and the original owner of a claim if it had not been assigned. We think, therefore, that, so far as the order denied the payment of the claims of which the petitioner

was an assignee, it should be reversed, with $10 costs and disbursements.

LAWRENCE, J., concurred.

O'BRIEN, J. (concurring).—I concur in the conclusion reached that, as assignee, she had the same *status* as the original creditor, under section 2717 of the Code. Though there was no formal assignment, the learned surrogate rightfully says "the voluntary payment [by petitioner] of decedent's debts subrogated her to the rights of his creditors, and created an assignment to her of the respective amounts paid."

PEOPLE *ex rel.* MEYER *v.* MASONIC GUILD AND MUTUAL BENEFIT ASSOCIATION.

SUPREME COURT, SECOND DEPARTMENT, ORANGE COUNTY SPECIAL TERM; JANUARY, 1892.

§ 2007.

Mandamus—when non-payment of costs awarded on motion for peremptory not punished as for contempt.

Section 2007 of the Code of Civil Procedure, providing that a person required to pay costs in a special proceeding instituted by a state writ, except where a peremptory writ of mandamus is awarded after the issuance of an alternative mandamus, may be punished as for a contempt of the court awarding the costs if he fails to pay them, although not strictly a penal statute, is to be construed according to the same rules which apply to that class of enactments.

A penal statute, where there is doubt, will not be so construed by

the judiciary as to result in the infliction of a punishment which the legislature may not have intended.

In a statute making a failure to pay the costs of a proceeding punishable as a contempt, permissive expressions should not be construed as mandatory and requiring the infliction of the punishment.

The provisions of section 2007 of the Code of Civil Procedure that a person who institutes a proceeding by a state writ and fails to pay costs awarded against him may be punished as for a contempt confers upon the court discretionary power which the successful party in such a litigation may properly invoke, but which the court is at liberty to exercise or not according to the facts of the case, and particularly with reference to the ability of the defeated party to pay the costs awarded against him, and, *it seems*, that the intention of the legislature was to allow the court to enforce payment of costs in such a case by means of contempt proceedings if under all the circumstances it seemed proper to do so.

(*Decided January*, 1892.)

Motion by the defendant to punish the relator as for a contempt in failing to pay the costs of the proceeding.

The relator obtained a judgment against the defendant, a mutual benefit association, and after a return of execution unsatisfied, moved at special term for an order that a peremptory writ of mandamus issue against defendant, directing it to levy an assessment on its members to pay the judgment. The motion was granted, and a peremptory mandamus issued in accordance with the order. This order was affirmed on appeal to the general term (see opinion, 58 *Hun*, 395). Upon appeal to the court of appeals the order of the general and special terms was reversed, and the motion denied with costs in all courts. The costs having been adjusted at $217.80, the same were demanded from the relator, who refused to pay them, and this motion was made. The relator thereupon claimed that the costs in this proceeding should be offset against his judgment, and that he was unable to pay them.

Adolphus D. Pape and *Samuel Campbell*, for defendant and motion.

John W. Lyon, for relator, opposed.

The costs in this proceeding cannot be offset against the judgment. 1st. The judgment was obtained in Meyer *v.* The Masonic Guild and Mutual Benefit Association. 2d. In that judgment plaintiff has both costs and damages. In the present proceedings there are simply costs, and the costs belong to the attorney, and not to the party (*In re* Knapp, 85 *N. Y.* 284; Place *v.* Hayward, 8 *Civ. Pro. Rep.* 353; Tunstall *v.* Winton, 31 *Hun*, 220; s. c., 92 *N. Y.* 646; Marshall *v.* Meech, 51 *N. Y.* 140; Naylor *v.* Lane, 5 *Civ. Pro.* 149; Lachmeyer *v.* Lachmeyer, 17 *Week. Dig.* 310; Carlton *v.* Goldman, 5 *Civ. Pro. Rep.* 153).

The attorney is regarded by virtue of his position as the equitable assignee of the judgment (Rooney *v.* Second Avenue R. R. Co., 18 *N. Y.* 360; Marshall *v.* Meech, 51 *N. Y.* 140; Tunstall *v.* Winton, 31 *Hun*, 220; Matter of Knapp, 85 *N. Y.* 284; Dimick *v.* Cooley, 3 *Civ. Pro.* 146.

Chapter 16, Title II., of the Code of Civil Procedure, relates to "special proceedings instituted by state writs." Section 2007 provides for the punishment of a person who refuses to pay costs. Mandamus being a special proceeding, the practice of collecting costs as in an action is not applicable.

BARTLETT, J.—Section 2007 of the Code of Civil Procedure provides that for the non-payment upon demand of the costs awarded by a final order made in a special proceeding instituted by a state writ (except where a peremptory writ of mandamus is awarded after the issuance of an alternative mandamus) the person required to pay the same may be punished for a contempt

of the court awarding the costs, as if the final order was a final judgment of the court.

In the present case the relator, without suing out any alternative writ, obtained a peremptory writ of mandamus against the defendant in the first instance, directing it to levy an assessment on its members to pay a money judgment. The order granting the peremptory writ was affirmed by the general term, but was reversed by the court of appeals, with costs. These costs amount to $217.80, and have been duly demanded of the relator, who has failed to pay them. Thereupon the defendant moves to punish him for contempt under the foregoing provisions of section 2007 of the Code.

I do not find that this section has ever been judicially construed. No such provision as it contains appears to have existed in the law prior to the enactment of the second part of the present Code of Civil Procedure.

The learned counsel for the defendant claims that it entitles his clients to enforce the collection of their costs by contempt proceedings against the relator as a matter of right, and furthermore that the costs awarded to the relator as plaintiff against the defendant, in the suit in which he recovered judgment, cannot be offset against the costs in this proceeding, inasmuch as the costs in this proceeding belong to the attorney, under the decision of the general term of the first department in the case of Tunstall *v.* Winton (31 *Hun*, 219).

In the view which I take of section 2007, it will not be necessary to discuss the question of offset.

While the section cannot be strictly called a penal statute, it nevertheless is to be construed according to the same rules which apply to that class of enactments. A penal statute where there is a doubt will not be so construed by the judiciary as to result in the infliction of a punishment which the legislature may not have intended (Wilton *v.* Wentworth, 5 *Foster, N. H.* 247).

"Statutes of this class," says Mr. Sedgwick, in his well-known treatise on statutory construction, "are to be fairly construed and faithfully applied, according to the intent of the legislature, without unwarrantable severity on the one hand or equally unjustifiable lenity on the other, in cases of doubt the courts inclining to mercy (*Sedgwick on Statutory Construction*, 2d Edition, 287). Looking at section 2007 of the Code of Civil Procedure in this light, it is to be observed in the first place that the tendency of recent legislation in this state has been strongly adverse to imprisonment for debt.

Furthermore it is to be considered, that the language of the section itself is not that the person required to pay the costs in a proceeding instituted by state writ must be punished for contempt in failing to pay them, or that the party in whose favor the costs are awarded is entitled to maintain contempt proceedings as a matter of right, but simply that the person required to pay the costs may be punished for contempt. In a statute of this kind I do not think that permissive expressions should be construed as mandatory. It seems to me that the intent of the legislature was to allow the court to enforce payment of the costs in such a case as this by means of contempt proceedings, if under all the circumstances it seemed proper to do so; as for example if it were apparent here that the relator had the means and was able to pay the costs, and nevertheless obstinately refused to pay. But I do not think the provision is designed to compel the court to imprison a poor man simply because he has been and is unable to pay the costs against him in the particular forms of litigation which must be instituted by state writs. In my opinion the section confers upon the court a discretionary power which the successful party in such a litigation may properly invoke, but which the court is at liberty to exercise or not according to the facts of the case, and

particularly with reference to the ability of the defeated party to pay the costs awarded against him.

Upon the evidence contained in the papers before me as to the relator's occupation and financial condition, I do not think he should be punished for contempt in failing to pay the costs in this matter.

The motion of the defendant must therefore be denied.

BOWEN, RESPONDENT, *v.* SWEENEY *et al.*, APPELLANTS, AND BOWEN AND OTHERS, RESPONDENTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; FEBRUARY, 1892.

§§ 539, 540, 829, 1537.

Partition—amendment of complaint on trial—competency of witness—testimony of tenant by courtesy initiate to transaction with decedent.

Where a demurrer to a complaint in an action for partition was sustained on the ground that the plaintiff's interest did not appear, and that nothing was alleged with respect to the making of a last will and testament by a decedent under whom the plaintiffs claimed, nor as to the absence of such an instrument, and thereupon the plaintiff served an amended complaint alleging that the decedent died "intestate, unmarried and without issue," but did not allege the making of any will or the invalidity of a devise thereby, and it was shown upon the trial that the decedent had left a last will and testament which was introduced in evidence, whereupon the plaintiffs sought to attack it by evidence with respect to its execution,—*Held*, that it was improper then to allow the plaintiff to amend his complaint by

alleging the invalidity of such will: [1, 5] that after the notice which plaintiff had received of the defects in his complaint the amendment should not have been allowed upon the trial [1, 5]; that the plaintiff, not being in possession of the property sought to be partitioned, nor of any part thereof, had, as the complaint existed at the time of the trial, no standing in court. [2]

In such a case, query, whether or not such an amendment introduced a new, separate and distinct cause of action, such as could not be imported into the complaint in an action for partition upon the trial. [5]

The right to maintain an action to partition real property by one claiming as joint tenant or tenant in common, as the heir of a decedent, notwithstanding an apparent devise thereof to another by the decedent, did not exist until the enactment of Laws of 1853, chap. 238, which conferred a new cause of action differing from any that had before existed. [4]

The only ground upon which the objection to evidence excluded can be sustained where no ground is stated is that it is irrelevant and immaterial. [7]

The husband of a party to an action who claims an interest in real property in litigation as devisee under a will is not incompetent to testify to conversations with the decedent regarding such will, merely because he is a tenant by the courtesy initiate in his wife's share of the property; his interest is simply a contingent interest, not vested, and is no disqualification. [6, 8, 11]

The interest which will preclude a witness from testifying to conversations with a decedent under whom the party in whose behalf he testifies claims must be a present, certain and vested interest, and not an interest uncertain, remote or contingent. [9]

Hobart v. Hobart (62 *N. Y.* 80), *In re* Clark (40 *Hun*, 233), followed. [10]

In an action wherein a will was declared invalid because of fraud and undue influence, testimony to declarations by the decedent with reference to her will made before she executed it and that the will was in her possession for days before she exectuted it, is material, and it is error to exclude it. [6, 12]

(*Decided February* 18, 1892.)

Appeal by the defendants, Michael Sweeney, Catherine Gallagher and Francis Gallagher from a judgment of the city court of New York directing a partition and sale of certain real property situate in the city of New

York, and adjudging a will made by Mary Theresa Hatton, deceased, invalid.

The facts are stated in the opinion.

Francis C. Devlin, for defendant, appellant, Michael Sweeney.

William H. Arnoux (*Arnoux, Ritch & Woodford*, attorneys), for defendant, appellant, Catherine Gallagher.

Bernard Zwinge, for defendant, appellant, Francis Gallagher.

Flamen B. Candler, for plaintiff, respondent, Michael Bowen.

Simeon B. Chittenden, for defendants, respondent, Thomas Bowen and others.

William J. Kelly, for defendants, appellants, Mary Ann Cane and Catherine Ward.

VAN BRUNT, P.J.—This action was brought for a partition and sale of certain property in the city of New York, the plaintiff claiming to be interested therein as tenant in common with certain defendants.

The first complaint in the action was demurred to by the appellants, and it was sustained apparently on the ground that no facts were alleged which showed
[1] any interest in the realty belonging to the demurring defendants, and that there was no clear averment of fact upon the subject of a last will and testament of Mary Hatton, or the absence of such an instrument. The plaintiff thereupon amended his complaint, alleging that Mary Hatton had died intestate, unmarried, and without issue. To this complaint the

appellants answered, setting up that the said Mary Hatton had made a will by which she devised to them all her estate, of which the premises in question were part, and that such devisees were in the exclusive possession thereof. The court thereupon made an order directing that the cause be put upon the circuit calendar, to the end that the trial of the action might be proceeded with, and the issues of fact therein contained, or such of them as might be necessary, might be tried before a court and jury.

Upon the case coming up for trial at the circuit, the will of Mary Hatton, referred to in the answer of the defendants, was introduced in evidence after proof, and thereupon the plaintiff sought to attack the same by evidence in reference to its execution. Objection being raised, apparently because of the condition of the pleadings, the plaintiff's counsel moved to amend his complaint by an allegation that Mrs. Hatton left what purported to be a will, but which was not her last will and testament, because it was not properly executed, and because she was not competent to make a will, and that it was obtained from her in an unlawful manner by undue influence. Objection was made by the defendants' counsel. The objection was overruled, and an exception taken. The plaintiff's counsel thereupon reduced the amendment to form, and the court stated that the amendment would be granted upon terms; and that, if the defendants desired, a juror would be withdrawn, and the trial postponed. The defendants' counsel stated that he did not desire to postpone the trial, and asked that the amendment be reduced to writing, and sworn to by the plaintiff, which was done, and the trial thereupon proceeded, and upon the close of the testimony certain issues were framed and submitted to the jury. The peculiarity of one of these issues it is not necessary to discuss, in view of the result which follows the decision of this appeal.

It is now urged that it was error in the court to allow the amendment which was made upon the trial, and in this view we are inclined to concur. The attention of the plaintiff's counsel was distinctly called to the defect in pleading upon the decision of the demurrer to the previous complaint, and he failed to amend his complaint meeting this objection.

On this state of facts, as the complaint existed at the time the trial of the issues was commenced at the circuit, the plaintiff had no standing in court; he not [2] being in possession of the property sought to be partitioned, or any part thereof. Whatever rights he had were conferred by section 1537 of the Code, where it is provided that a person claiming to be entitled as a joint tenant or tenant in common by reason of his being the heir of a person who died holding and in possession of real property may maintain an action for the partition thereof, whether he is in or out of possession, notwithstanding an apparent devise thereof to another by the decedent, and possession under such devise; but in such an action the plaintiff must allege and establish that the apparent devise is void.

The right to maintain such an action did not exist prior to the passage of chapter 238 of the Laws of 1853, and hence it is an entirely different action from [3] the ordinary action of partition, which could only be brought where two or more persons held and were in possession of real property, possession being a necessary ingredient to the maintenance of the action. Chapter 238 of the Laws of 1853 was an innovation in the procedure for partition, and conferred a new and different right of action from that which ever ex- [4] isted before. And it may be doubtful whether it is not such a new and separate and distinct cause of action that it cannot be imported into a complaint for partition by amendment. But, whether it was so or not, we do not think that, upon a trial after the notice

[5] which this plaintiff had received of the defects in his complaint, the amendment should have been allowed. Without discussing in any way the merits of this case, or considering the testimony which is referred to at so great length upon the points of counsel in reference to the sufficiency of the proof to sustain the findings of the jury, it will only be necessary to call attention to one or two exceptions to the admission of evidence which are fatal to the judgment in question.

One Francis Gallagher was called as a witness upon the part of the defendants. Much testimony had been given in reference to the knowledge which Mrs. Hatton had of this will, and of the circumstances under

[6] which it was executed; it being claimed that she did not know what she was doing, and that it was procured through the undue influence and fraud of the devisees. After having testified that he was the husband of Mrs. Gallagher, one of the devisees named in the will of Mrs. Hatton, he was asked: "Had you a conversation with her on the morning before she executed the will?" This was objected to on the ground that the witness is interested in the will, and is not competent to testify. He then testified: "I have children by my present wife." The objection was sustained, and the defendants excepted. He was then asked: "Did you hear Mrs. Hatton say anything about executing, or having a will made for her, before she executed it?" This was objected to, the objection sustained, and defendants excepted. "*Question.* Do you know that Mrs. Hatton had this will in her possession for three or four days before the morning she executed it? (Objected to; objection sustained; exception.) *Q.* After the will was executed, did you hear Mrs. Hatton read it? (Objected to; objection sustained; exception.)" No ground is stated for these last three objections, and it is claimed by the respondents that, as the objection was a general one, if the evidence could be excluded on any ground whatever, the

court will not hold on appeal that there was error in excluding the evidence. We are not aware of any [7] such rule. On the contrary, the only ground upon which an objection can be sustained without any ground being stated is that it is irrelevant and immaterial. But we think that it is fair in the construction of these objections to assume that the evidence was ruled out upon the same ground as was stated in the first objection above referred to. In making this ruling, however, the court evidently erred. It is true that, if Mrs. Gallagher died leaving no will, and without having conveyed her real estate, the witness would be entitled to a tenancy by the curtesy. But, as this is sim- [8] ply a contingent interest, and not vested, it was no disqualification. The children of a party living have precisely the same interest in the property owned by their parent. If he dies intestate, and without having conveyed the property, it falls to them. But they have never been excluded upon the ground of interest. This rule is laid down in 1 *Greenl. Ev.* § 390, where it is stated that the true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain, and [9] vested interest, and not an interest uncertain, remote, or contingent. Thus the heir apparent to an estate is a competent witness in support of the claim of his ancestor, though one who has a vested interest in remainder is not competent; and if the interest is of a doubtful nature, the objection goes to the credibility of the witness, and not to his competency.

This rule was applied in the case of Hobart *v.* Hobart (62 *N. Y.* 80), and *In re* Clark (40 *Hun*, 233), and in that case the distinction between the contingent [10] interest of a husband in the living wife's real estate, and the vested interest of a wife in the real

estate of her husband, is pointed out. In the one case the interest may be terminated by the wife; in the other, the husband cannot divest his wife of her [11] right to dower. Therefore the husband was a competent witness in reference to transactions between himself and the deceased.

But it is urged by the respondents that if these questions had been answered the testimony at most would only have tended to prove that the decedent knew when she executed the will that it was her will, and that fact the jury and the court found in favor of the appellants; so, as they were able to establish that fact without any of the answers to these questions, they were not prejudiced by the rulings of the court excluding them. But this claim does not by any means meet the objection. It is claimed that this will was obtained by fraud [12] and undue influence, and the jury have so found. Now, the declarations of Mrs. Hatton in reference to her will, made before she executed it, are certainly exceedingly important upon such issue; as also is the evidence of her possession of this will for days before its execution; and in view of the attempt to establish the fact that Mrs. Hatton could not read, evidence going to show that the witness heard her read the will inquestion seems to be most material. We see no escape from holding that the exclusion of this testimony was error. and very serious error, to the appellants.

We think, therefore, that the judgment must be reversed, and a new trial ordered, with costs to appellants to abide the event.

O'BRIEN, J., concurred.

NOTE ON ACTION FOR PARTITION OF REAL PROPERTY BY AN HEIR-AT-LAW WHO ASSERTS THAT AN APPARENT DEVISE THEREOF IS VOID.

Statute.—As is stated in the opinion above reported, the right to maintain an action to partition real property by one claiming as joint tenant or tenant in common, as the heir of a decedent, notwithstanding an apparent devise thereof to another by the decedent, did not exist until the enactment of Laws of 1853, chap. 238. See, to this effect, Greene *v.* Greene (Supm. Ct., Erie Spec. Term, Feb. 1889), 23 *St. Rep.* 869, 875; Malaney *v.* Cronin (Apl. 1887), 44 *Hun*, 270; s. c., 7 *St. Rep.* 700.

Section 2 of chapter 238 of the Laws of 1853 (same Stat., 4 *Edm. St. at L.* 504), conferring this right of action, reads as follows: "§ 2. Any heir or heirs claiming lands, tenements or hereditaments by descent, from an ancestor who died holding and being in possession of the same (whether such heir or heirs be in possession or not), may prosecute for the partition thereof, notwithstanding any apparent devise by such ancestor, and any possession held under the same devise, provided that such heir or heirs shall allege and establish in the same suit, action or proceeding that such apparent devise is void."

This provision remained in force until September 1, 1880, when, having been repealed by Laws of 1880, chap. 245, section 1537 of the Code of Civil Procedure took its place. The changes thereby made in the statute were merely verbal, and it is said in Greene *v.* Greene (23 *St. Rep.* 869, 875) to be "in effect the same, although its meaning is not as clear as the act of 1853."

Section 1537 of the Code of Civil Procedure is as follows: "§ 1537. A person claiming to be entitled as a joint tenant or a tenant in common, by reason of his being an heir of a person who died holding and in possession of real property, may maintain an action for the partition thereof, whether he is in or out of possession, notwithstanding an apparent devise thereof to another by the decedent, and possession under such a devise. But in such an action the plaintiff must allege and establish that the apparent devise is void."

Constitutionality of the Statute.—In Ward *v.* Ward (Supm. Ct., Fourth Dept., Jan. 1881, 23 *Hun*, 431) the court, per HARDIN, J., says (at p. 433): "There is no force in the suggestion that the act of 1853 is unconstitutional, because it allows the title to be determined in such an action of partition (Shumway *v.* Shumway, 1 *Lans.* 474; s. c., 42 *N. Y.* 143)."

Note on Action for Partition.

Nature of Action.—"The statute conferred a new cause of action differing from any that had before existed" (Bowen *v.* Sweeny, *ante*, p. 79). To like effect, Malaney *v.* Cronin (Apl. 1887), 44 *Hun*, 273).

"The action, though authorized by statute, has the incidents and results simply of an ordinary action of partition" (Hewlett *v.* Wood [Nov. 1873], 55 *N. Y.* 634).

"The action is in the nature somewhat of an ejectment" (Hewlett *v.* Wood [May, 1875], 62 *N. Y.* 75, 78).

"The cause of action is for partition, and partition only" (Henderson *v.* Henderson [May, 1887], 44 *Hun*, 422; s. c., 9 *St. Rep.* 356).

"The action is not at law, but of an equitable character, and should be disposed of by the court at special term with the aid of a jury to determine the questions of fact necessary to establish the title at law" (Hewlett *v.* Wood, 1 *Hun*, 478; s. c. on another appeal [Mch. 1875], 3 *Hun*, 736, aff'd 62 *N. Y.* 75).

Actions of this character "have none of the qualities or consequences of an ejectment. By them nothing is determined as to the possession or title to the land, except as the title may be affected by the devise in question" (Marvin *v.* Marvin [Ct. App., Feb. 1871], 11 *Abb. Pr. N. S.* 102).

By Whom Maintainable.—"A person claiming to be entitled as a joint tenant or a tenant in common, by reason of his being an heir of a person who died holding and in possession of real property, may maintain an action for the partition thereof" (*Code Civ. Pro.* § 1537).

The plaintiff must be the heir of one who died holding and in possession, and the devise he may attack is the devise of such person. Accordingly, in Greene *v.* Greene (Supm. Ct., Erie Sp. T., Feb. 1889, 23 *St. Rep.* 869), where the plaintiff's father by an ante-nuptial agreement conveyed land to trustees for the use of plaintiff's mother during her life and remainder in fee to the heirs of her body, and died leaving a will devising the same land to three of plaintiff's brothers, who upon the subsequent death of their mother entered into possession under their father's will, and repudiated any claim of plaintiff thereto, it was held that the plaintiff claiming under the ante-nuptial agreement could not maintain an action of partition under section 1537 of the Code of Civil Procedure and therein attack the devise made by his father as void. The court making the determination at special term said (at page 875): "The decedent mentioned in this section is the person who died holding and in possession of real property. The mother of the plaintiff, and not his father, was the person who died holding and in possession of the real property." The

court also said (at page 875): "This section does not afford the plaintiff relief from the common-law rule that, to maintain partition, the plaintiff must be actually or constructively in possession."

When Action Maintainable.—"This form of action" is said in Van Schuyler *v.* Mulford (59 *N. Y.* 426–430) to be "at least a doubtful procedure for the trial of adverse or hostile claims to real property. The title of the parties should be first established by the proper action before proceedings taken for partition." This statement has never been concurred in, not even inferentially, in any other decision made in this class of actions, and it is expressly held to be an obiter dictum in Wager *v.* Wager (Supm. Ct., Fourth Dept. Jan. 1891, 23 *Hun*, 439, 442), where the court says, in explanation of it, "No allusion was made to the act of 1853, and what is found in the dictum probably was stated in respect to the general rule as it was understood before the enactment of 1853."

"It is only when the whole will or an entire devise of real estate is attacked for invalidity that a suit or proceeding can be instituted under the act in question," and the action cannot be maintained where "neither the will . . . nor any 'devise' therein is void" (McKeon *v.* Kearney [Supm. Ct., N. Y. Co. Sp. T., Dec. 1878], 57 *How. Pr.* 349).

Where the validity of a will was admitted, and the validity of a provision therein working an equitable conversion of the realty into personalty was also conceded, but the disposition of some of the personalty so created is claimed to be invalid, the action cannot be maintained (*Id.*).

A power of sale given to executors by a will cannot be attacked under this statute, nor where the time of executing the power is not stated will it prevent the maintenance of an action for partition (Duffy *v.* Duffy [Nov. 1888], 50 *Hun*, 266; s. c., 19 *St. Rep.* 228; *N. Y. Supp.* 223; but see, in part to the contrary, Henderson *v.* Henderson [May, 1887], 44 *Hun*, 420; s. c., 9 *St. Rep.* 356; Jenkins *v.* Convoy [Feb. 1877], 10 *Hun*, 77).

The statute "confers a general power upon the court to determine the validity of 'an alleged devise'" (Wager *v.* Wager [Jan. 1881], 23 *Hun*, 439, 440).

"The fact that one to whom the land was devised is in possession, claiming to own it, does not deprive the court of jurisdiction" (Ward *v.* Ward [Supm. Ct., Fourth Dept., Jan. 1881], 23 *Hun*, 431).

Adverse possession of one claiming under the devise attacked is not a bar to the action (Wager *v.* Wager [Jan. 1881], 23 *Hun*, 439, 444).

Note on Action for Partition.

"Action of partition can be maintained to determine the validity of any devise or will of real estate notwithstanding an adverse possession" (Hewlett *v.* Wood, 62 *N. Y.* 278; and see Malaney *v.* Cronin [Apl. 1887], 44 *Hun*, 270; s. c., 7 *St. Rep.* 700).

The action may be maintained notwithstanding a conveyance by the devisee named in the will, but in that case both the devisee and the grantee or grantees must be made parties defendant. "The purpose of the law cannot and ought not to be thwarted by a transfer of the devisee's apparent title to a party whose title or possession is no other or better than the devisee's" (Malaney *v.* Cronin [Apl. 1887], 44 *Hun*, 271, 273; s. c., 7 *St. Rep.* 700).

Where a will attempted to create a trust and power of sale in the executors which was void, and the executor conveyed a part of the property to one of those for whose benefit the trust was attempted to be created, it was held that the action could be maintained and that the complaint alleging these facts did not state two causes of action or improperly unite causes of action (Henderson *v.* Henderson [May, 1887], 44 *Hun*, 420; s. c., 9 *St. Rep.* 356).

Where a will attempted to create a power of sale under which a deed was executed by the person to whom it was given and then by her grantee conveyed back to her, a judgment declaring the power invalid and directing an accounting of rents and profits and a partition, was sustained in Jenkins *v.* Conboy (Feb. 1887, 10 *Hun*, 77).

A devise to a devisee who is incompetent to take being clearly void and of no force or effect, an action to partition real property brought by the heir-at-law of the devisee, in which such a devise is attacked, is within the words of the act and may be maintained. So held where the property sought to be partitioned was attempted to be devised in the will to one who was incompetent to take by devise because of alienage (Hall *v.* Hall [Feb. 1878], 13 *Hun*, 307; aff'd 81 *N. Y.* 130).

Parties.—Where the devisee has conveyed the real property, both she and her grantee or grantees should be made parties defendant (Malaney *v.* Cronin [Apl. 1887], 44 *Hun*, 270; s. c., 7 *St. Rep.* 700).

"All persons claiming any portion of said real estate by virtue of said devise are necessary parties to such an action" (Henderson *v.* Henderson, 44 *Hun*, 420).

Where a trust and power of sale attempted to be created in an executor are asserted to be void, and the executor has conveyed a part of the real property to one of those for whose benefit the trust was designed, both the executor and his grantee should be made parties defendant notwithstanding the grantee is interested in a part of the property (*Ib.*).

Note on Action for Partition.

Pleading.—In Velie *v.* Newark City Ins. Co. (Supm. Ct., Ulster Co. Spec. Term, Feb. 1883, *N. Y. Civ. Pro.*), Judge WESTBROOK, in support of the proposition that two or more distinct and separate reasons for the relief asked in a complaint may be set forth therein, makes the following reference to pleading in this class of action, which, though *obiter*, well expresses the general view of the profession as to the statement of several reasons for the attacking a will or devise; he says: "Take, for instance, the case of a party who is heir-at-law of a deceased testator, seeking, under section 1537 of the Code, to partition and to recover property held under an alleged will. The reason which he assigns in his complaint for a recovery is, that the apparent devise, under which the property is held, is void, because, first, the testator was legally incompetent to make a valid will; second, the instrument, alleged to be a will, was procured by fraud and undue influence; third, the execution thereof was insufficient and defective."

It is incumbent upon plaintiffs to allege that the apparent devise is void and that they are the heirs of the ancestor (Wager *v.* Wager [Jan. 1881], 23 *Hun*, 439–441).

Where a complaint alleged that the widow of the decedent was in possession of the premises since his death, "claiming to hold said premises under and by virtue of the apparent devise aforesaid and by no other claim," "that said apparent devise is void," "that said devise, so far as real estate is concerned, is void for uncertainty, and that said will contained no sufficient words of conveyance to pass the title to said premises" to said widow,—*Held*, that "the invalidity of the will was sufficiently averred, as the defendant went to trial without questioning the sufficiency of the allegation" (Ward *v.* Ward [Jan. 1881], 23 *Hun*, 431–433).

Where, in an action for the partitioning of real property, the plaintiff alleges that an apparent devise by one, as whose heir-at-law he claims, is void for the reason, among other things, that the execution of the will is defective and that its making was induced by undue influence, an order should not be made after answer directing the plaintiff to furnish a bill of the particulars in which the execution of the will is alleged to be defective and of any particular or special act or false representation relied upon to establish undue influence, for the reason that to require the first of these particulars would be to require the plaintiff to present the legal arguments showing wherein the will was not properly executed, and to require the second would be to require the evidence upon which the plaintiff relies to establish undue influence, and also because fraud is not

charged in the complaint (Hazard *v.* Birdsall [Supm. Ct., Fifth Dept., Oct., 1891], 21 *N. Y. Civ. Pro.* 304).

The complaint may, as incidental relief, demand the cancellation of a deed by the executor the devise to whom is attacked (Henderson *v.* Henderson, 44 *Hun*, 420).

In Voessing *v.* Voessing (Jan. 1878, 12 *Hun*, 678) the general term of the supreme court in the first department says: "In this case the plaintiffs, claiming the land by descent as heirs-at-law, commenced this action for a partition. They alleged in the complaint an apparent devise by their father by will, which was void, and also an adjudication upon the will, declaring it so be so. The paragraphs containing these averments were, on motion, stricken out as irrelevant. This was erroneous, and, *it seems*, would not have been done had there not existed some misapprehension of the nature of the action. . . . It was essential to the plaintiffs' case that they should aver the existence of the devise and its invalidity, and they did so."

Receiver and Injunction.—In such an action an application for a receiver of the property and an injunction restraining collection of rents, etc., will not be granted *pendente lite* where it is in the possession of executors and trustees having an apparently valid title and the claim of the plaintiff as heir-at-law is doubtful and uncertain (Patterson *v.* McCunn [Supm. Ct., N. Y. Co. Sp. T., Aug. 1873,] 46 *How. Pr.* 182).

Trial.—"Under the provisions of art. 1, § 2, of the constitution of the state, issues of fact joined in proceedings under the statute must be tried by jury, unless the parties assent to a different mode" (Marvin *v.* Marvin [Ct. App., Feb. 1871], 11 *Abb. Pr. N. S.* 102, 105).

"Issues of fact are to be made up and tried by a jury, and when the legal title is established, a partition or a sale may be granted upon application to the court, as the relief demanded after the main subject of the controversy has been determined by a jury. . . . In partition cases the verdict of a jury stands upon the same footing, the proceedings on a trial are liable to the same rules, and subject to the same exceptions, as in other actions, and will only be reversed for legal errors" (Hewlett *v.* Wood [May, 1875], 62 *N. Y.* 75–78).

"If there be issues of fact in the case, upon the result of which depends the title of any of the parties, it becomes the duty, and, as I think, it is the right of the court, to send such issues to a trial by a jury, either upon a settlement of special issues or on the pleadings themselves; and, after determination of that issue, to proceed in the

action as provided by section 23 of the Revised Statutes" (Hewlett *v.* Wood [Mch. 1875], 3 *Hun*, 736–738; aff'd 62 *N. Y.* 75).

"If the party desires a trial of issues arising in such an action by a jury, he is entitled thereto by making a timely demand therefor. The special term is required to yield to such a demand in a proper case, and send the issues to the circuit for determination by a jury, and may require the verdict to be certified back to the special term, where further relief may be given as the case may require" (Ward *v.* Ward [Jan. 1881], 23 *Hun*, 431–433).

The plaintiffs must establish that the apparent devise is void and that they are the heirs of the ancestors (Wager *v.* Wager [Jan. 1881], 23 *Hun*, 439–441).

Decree.—In these actions "nothing is determined, as to the possession or title to the land, except as the title may be affected by the devise in question. It may well be that an heir who has proceeded under this section [§ 2, chap. 238, Laws 1853], and obtained a judgment declaring the devise invalid, may never be able to recover the land, from inability to show a valid title in his ancestor. All that he has accomplished is to remove the obstacle that the alleged devise might interpose" (Marvin *v.* Marvin [Ct. App., Feb. 1871], 11 *Abb. Pr. N. S.* 102, 105).

"As an incident to this cause of action, the plaintiff has the right to remove the cloud upon the title of the heirs caused by the apparent devise contained in the will of the deceased, and all persons claiming any portion of such real estate by virtue of such devise are necessary parties to such an action," and *it seems* that where in such an action the validity or invalidity of the alleged devise has been determined, "any party may be enjoined from setting up or from impeaching said devise, as justice may require;" that there is "no difficulty in giving effect to the decree which the court may ultimately pronounce in such a case;" and that where the devise is declared void and a partition or sale directed, possession may be awarded (Wager *v.* Wager [Jan. 1881], 23 *Hun*, 439–443).

The action has the results simply of an ordinary action of partition (Hewlett *v.* Wood, 55 *N. Y.* 635).

New Trial.—A new trial cannot be had of course, as in an action of ejectment (Wager *v.* Wager [Jan. 1881], 23 *Hun*, 439, 443; Marvin *v.* Marvin [Ct. App., Feb. 1871], 11 *Abb. Pr. N. S.* 102, 104).

Review.—The judgment can be reviewed in the court of appeals only as prescribed by the Code of Civil Procedure, and that court has the power only to review questions of law (Hewlett *v.* Wood, 55 *N. Y.* 635).

Instances.—For some cases in which the validity of a devise was determined in an action of this character, but no point of practice under the statute was decided, see Greene *v.* Greene, 26 *St. Rep.* 588; s. c., 54 *Hun*, 93; aff'd 125 *N. Y.* 506; Hall *v.* Hall, 81 *N. Y.* 130.

TUCK, RESPONDENT, *v.* MANNING.

WILSHIRE, APPELLANT, *v.* SAME.

AMY, APPELLANT, *v.* SAME.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; FEBRUARY, 1892.

§§ 712, 721–725.

Attachment—return of, when to be made—cancellation of improper return.

An attachment is not in any manner merged in, discharged, superseded, or in any manner affected by the recovery of judgment by the attachment creditor [1].

Where an attachment has been vacated or annulled, the sheriff must forthwith file in the clerk's office the writ with an indorsement of his proceedings thereon [2], but where it has been neither vacated nor annulled, a return by the sheriff of the attachment to the clerk of the court with an indorsement thereon that it is "merged in the judgment and execution," is unauthorized by law [3].

Where through inadvertence, mistake, or error the sheriff makes an unauthorized return of an attachment and execution, the rights of the creditor are not impaired or defeated [4–7], but the court has power to and should permit the sheriff to take the attachment and execution from the files of the court, cancel the returns thereon, and proceed under them according to law.

Christal *v.* Kelly (88 *N. Y.* 285) [5]; Pach *v.* Gilbert (20 *N. Y. Civ. Pro.* 300) followed.

(*Decided February* 18, 1892.)

APPEAL by the plaintiffs in the actions of Wilshire *v.* Manning and Amy *v.* Same, from an order made in the case of Tuck *v.* Manning requiring Hugh J. Grant, late sheriff of the city and county of New York, to take from the files of the clerk of said city and county an attachment and execution filed by him, cancel the returns thereon, and proceed thereunder according to law.

The facts are stated in the opinion.

Edward Bartlett, for appellant, Wilshire.

Theodore F. H. Meyer, for appellant, Amy.

Grosvenor S. Hubbard, for respondent, Tuck.

W. Bourke Cockran, for Grant, late sheriff, etc.

O'BRIEN, J.—This appeal grows out of certain attachments issued to Mr. Grant, as sheriff, in the year 1889, against the property of one Manning. Each of the plaintiffs in the above-entitled actions issued attachments, and each subsequently issued one or more executions, some against attached property, and others not against attached property. The sheriff, under the attachments, levied on a claim supposed to be due Manning from Lawrence Giles & Co. of this city. This firm denied the indebtedness to Manning, and the sheriff returned one of the attachments and the execution in the case of Tuck unsatisfied, so far as this claim is concerned. Tuck commenced, on January 14, 1887, an action against Manning, and procured a warrant of attachment, which was delivered to the sheriff, and which, on January 15, 1887, was served on Lawrence Giles & Co., and a levy made with the usual notice. The latter firm gave a certificate that they had no property belonging to Manning. Tuck recovered judgment, issued execution, and collected a part of the judgment, and there

is now due him $2282.85. On September 10, 1888, the sheriff returned and filed the execution with the clerk of the city and county of New York, indorsed with the amount collected, and that there was no property of the defendants in the county out of which he could cause to be made a levy for the residue, and at the same time returned and filed with the clerk the warrant of attachment, indorsed, "Merged in judgment and execution issued July 10, 1888."

Wilshire and Amy, the plaintiffs in the actions above entitled Nos. 2 and 3, commenced actions against Manning, and procured attachments, which were delivered to the sheriff and by him served, and a levy made on Lawrence Giles & Co., who in each case made the same return as in the Tuck action. These plaintiffs recovered a judgment, issued execution, and collected nothing. On August 8, 1890, in an action in this court brought by Lawrence Giles & Co. against Tuck, Wilshire and Amy, and Manning and the sheriff, it was adjudged that, at the time of the service of, and levy under these three warrants of attachment, on Lawrence Giles & Co., they were indebted to the defendant Manning, and they were ordered to and did pay to Grant, as sheriff, the sum of $2178.15, the amount of the debt, less certain costs and expenses. On October 15, 1890, an *ex parte* order was made in the action of Tuck against Manning that the sheriff take from the files of the county clerk the attachment and execution in said action, cancel the returns on them, and proceed thereon according to law. The sheriff, on notice to Tuck, Wilshire, and Amy, moved to vacate this order, and, upon such motion, the order from which this appeal is taken was made. Upon this state of facts, which were agreed upon it is insisted by Amy and Wilshire that the court had no power to make the order appealed from, for the reason, among others, that, at the time the money determined to be due Manning reached the hands of the sheriff, he was destitute

of process under which he could apply on Tuck's judgment the money thus received,—the Tuck attachment having been returned, the Tuck second execution having been likewise returned, and his third execution in the hands of the wrong officer. It is further claimed that, at the time the *ex parte* order of October 15, 1890, was made, the judgment had been obtained by Tuck, on which one valid execution had been issued, and returned partly unsatisfied, from which appellants insist that the provisional remedy—that attachment—was thereby extinguished, and that it had no force or validity whatever, either at the time that the *ex parte* order was made, or when the order now appealed from was made. This contention is predicated on the presumption that the attachment was then dead process, and, like any other process, when once dead was gone forever. If the appellants were right in their views, either that the attachment was merged in the judgment, or that the sheriff properly returned, with the indorsement thereon, the attachments and executions in the Tuck actions, then there would be much force in their positions. We are of opinion, however, that the authorities and a reading of the sections of the Code relating to the subject of [1] attachments and executions will not sustain the proposition that the return of the attachment was merged in, discharged, superseded, or in any way affected by the judgment; nor have we been referred to any provision of the Code which required the sheriff to return the attachments at all, excepting only where an attachment has been vacated or annulled (Section 712). Under the former Code, section 242, it was provided that, when the writ shall be fully executed and discharged, the sheriff shall return same; but the present Code, by section 712, referred to, provides that where a warrant of attachment has been vacated or annulled, the sheriff [2] must forthwith file in the clerk's office the writ, with the indorsement of his proceeding thereon.

In the Tuck action the attachment was neither vacated nor annulled, and therefore the return by the
[3] sheriff of the warrant of attachment to the county clerk, and the indorsement thereon, were unauthorized by law.

The sole question remaining, then, is whether, in a case of this kind, where, through inadvertence, mistake, or error, the sheriff makes an unauthorized return, the rights of the attaching creditor are to be impaired
[4] or defeated, and court remediless to correct the error. It seems to us that, irrespective of any of the provisions of the Code of Civil Procedure, this court, in regard to amendments, has the inherent power, at any time, to make any necessary order to correct the pleadings or proceeding in an action when the same is in furtherance of justice.

In Christal *v.* Kelly, 88 *N. Y.* 285–290, it was held that "the power to amend process and pleadings is inherent in the court, as part of its ordinary juris-
[5] diction," and a reference to the cases will show that such power has been exercised (People *v.* Ames, 35 *N. Y.* 482; Barker *v.* Binninger, 14 *N. Y.* 270–278; Burnham *v.* Brennan, 42 *N. Y. Super. Ct.* 49–76). Apart, however, from this, sections 721–725 of the Code of Civil Procedure, and particularly section 725, expressly confer such power upon the court.

The appellants call our attention to the case of Pach *v.* Orr (112 *N. Y.* 670), wherein the court of ap-
[6] peals modified an order appealed from, by striking out the words "and the lien of said attachment is restored." That was a case in which the attachment was granted and subsequently vacated *ex parte*, and between that time and the time when the order restoring the attachment was granted certain confessions of judgment had been made, and executions levied upon the same property upon which the sheriff had levied under the attachment, prior to its being vacated. It is

insisted that this is authority, although no opinion was delivered by the court, for the position that no other relief could be granted to the plaintiff in the attachment suit than would be afforded by setting aside the order vacating the attachment. If, however, the appellant had pursued his investigation further, he would have seen that in the case of Pach *v.* Gilbert (20 *N. Y. Civ. Pro.* 156), where the question of priority under that very attachment in the former appeal was in question, it was determined in favor of the attaching creditors, and is a support for the position that the levy of the warrant of attachment on the debt of Lawrence Giles & Co. in the Tuck suit was not affected by the subsequent act of the sheriff.

We are of opinion, therefore, that the court had the power to make the order appealed from, and, such
[7] power being discretionary, we do not understand that it is claimed that the exercise of such discretion upon the fact here presented was improper. If necessary, however, to decide that point, we think that, the court having the power to make the order, its discretion was wisely exercised. The sheriff received the three attachments, that of Tuck on January 14, 1887, that of Wilshire on February 12, 1887, and that of Amy on May 8, 1888. The return of the sheriff having been unauthorized, the court was then asked, in effect, to reinstate the original attachment and execution of Mr. Tuck, so that he would occupy the position that he would have been in had the attachment and execution remained in the sheriff's hands continuously up to the time of the making of the application to the court. In the mean time neither Wilshire nor Amy did any act or acquired any rights predicated on the irregularity of the sheriff, nor were the rights of any other person intervening affected by the order appealed from. We are of opinion, therefore, that the order should be affirmed, with costs.

VAN BRUNT, P.J., and LAWRENCE, J., concurred.

SEASONGOOD *et al. v.* NEW YORK ELEVATED R. R. CO., *et al.*

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL TERM; MARCH, 1892.

§ 3256.

Disbursements—when stenographer's fees not taxable.

A stenographer employed to take minutes of the evidence given upon a trial before a referee is not an officer of the court, and his charges or the proportionate of his charges paid by the successful party to the action cannot be taxed as a disbursement unless it has been expressly stipulated that they may be so taxed. This is so even where the attorneys for the respective parties agree for convenience to employ a stenographer to take the minutes, each party to pay one half of the expenses; and where no such agreement is made *it seems* that the parties are jointly liable for the stenographer's bill.

Varnum *v.* Wheeler (9 *N. Y. Civ. Pro.* 421); Wright *v.* Keenan (52 *N. Y. Super.* 530); Colton *v.* Simmons (14 *Hun*, 75); Marx *v.* City of Buffalo (87 *N. Y.* 184); Adams *v.* N. Y., Lake Erie & W. R. R. Co. (30 *Abb. N. C.* 180); Hasbrouck *v.* Manhattan R. R. Co. (*unreported*) followed; Stevens *v.* N. Y. Elevated R. R. Co. (18 *N. Y. Civ. Pro.* 350) distinguished.

(*Decided March*, 1892.)

Motion by the defendants for a new taxation of costs.

These are the ordinary actions against the elevated railroad companies, to recover damages and for an injunction. After the cases had appeared upon the calendar of the court, they were referred to a referee, to hear and determine. Judgments were entered on the report of the referee against the defendants, from which judgments

defendants appealed to the general term of this court. On the argument of the appeal before the general term the judgments were affirmed, with costs.

On the 18th day of March, 1892, bills of costs were taxed for the plaintiff. The clerk of the court, on the objection of defendants' counsel, taxed the amount mentioned in each bill of costs for a copy of stenographer's minutes. Counsel for defendants objected to the taxation, on the ground that the cases were tried before a referee, and that, as the stenographer was not an official stenographer of the court, there was no authority for the taxation of any sum for stenographer's minutes as a disbursement, and that the disbursements for said minutes were improper and unnecessary.

In the orders by which these cases were referred there was no stipulation by which the defendants agreed that the prevailing parties should tax disbursements for stenographer's minutes, nor was any agreement entered into or entry on the minutes made as to the expense of procuring stenographer's minutes.

Davies, Short & Townsend for defendants and motion.

Sackett & Bennett for plaintiffs, opposed.

McAdam, J.—The stenographer at a reference is not an officer of the court.

It was held in the case of Varnum *v.* Wheeler (Supreme Court, 9 *N. Y. Civ. Pro.* 421) that "a stenographer is not legally known in judicial proceedings, except as an officer of the court, acting under its direction and subject to its control; hence, the cases holding that the expense to a party for a copy of the minutes kept by him, in a trial before a referee or other party where his services are invoked, is not taxable as a necessary disbursement, are not applicable to the case in hand, the

employment being by the party or parties for his or their accommodation simply, and, therefore, a personal charge against the employer; and unless so stipulated, such expenses cannot be taxed as a necessary disbursement (Marx *v.* The City of Buffalo, 87 *N. Y.* 184; Rust *v.* Hauselt, 2 *N. Y. Monthly Law Bul.* 6). The rule in reference to a trial had at the circuit is different. There the stenographer is an officer of the court, and acts in an official capacity."

In Wright *v.* Keenan (53 *N. Y. Super.* [21 *J. & S.*], 530) it was held that "the stenographer's fee on the trial of an action before a referee is not a disbursement within the meaning of the law regulating the adjustment of costs, and cannot be taxed without a stipulation between the parties to that effect (Newhall *v.* Appleton, 4 *Law Bul.* 5); and where the parties on a trial before a referee employ a stenographer to take the minutes and agree that each party shall pay half the fee, the successful party cannot tax as a disbursement the amount paid by him (Colton *v.* Simmons, 14 *Hun*, 75; Marx *v.* City of Buffalo, 87 *N. Y.* 184)."

It has also been held that even where the attorneys for the respective parties agree for convenience to employ a stenographer to take the minutes, each party to pay one half of the expense, that the successful party cannot tax costs of such minutes as a disbursement. This was decided in the case of Colton *v.* Simmons (First Dept.). The opinion was written by DAVIS, P.J., part of which is as follows:

"On presenting the bill of costs for adjustment to the clerk, the defendant claimed as a disbursement the sum of $1847 paid by him to the stenographer for his services. The clerk refused to adjust that item on the ground that it was not a taxable disbursement. The special term has overruled the decision of the court and directed a taxation of this item. We think the clerk was right in rejecting the item. It was not a disbursement

within the meaning of the law regulating the adjustment of costs. The parties for their mutual convenience agreed upon the employment of a stenographer, and that each should pay half the expenses of his services in taking the notes of the evidence; he was not rendering any official service, nor was he acting within any provision of the Code which allows the expense in taking notes or furnishing the parties therewith to be treated as a disbursement in the case.

"It is very clear that if they had employed under such mutual agreement any clerk of ordinary capacity to take notes for them and furnish them copies of his notes, the services would not be regarded as a disbursement; nor was it ever known under the former system that charges could be made by one party against the other for the taking of notes of the testimony on the trial. The fact that the person thus employed was a stenographer and used a shorter and easier mode of taking notes could not make any difference in the rule applicable to the case.

"Either party could have employed his own stenographer and certainly would not have charged the other party with the expense thereby incurred as a disbursement in the action, and the fact that they unite in such employment, for the purpose of lessening the expense of each, gives no force to the suggestion that what one pays as his proportion can be taxed against the other on the termination of the action."

In Marx *v.* City of Buffalo (87 *N. Y.* 184), above cited, the attorneys for the respective parties at the beginning of the trial agreed that a stenographer should be employed, whose fees should be paid by the parties in equal proportions. An extra copy of his minutes was ordered by the referee. This was taxed as an item of the plaintiff's disbursement. It was held that it was error in an opinion by Judge FINCH, part of which is as follows:

"The stenographer employed was not the official stenographer of the court, but was hired as any clerk or

copyist might have been, and this was done under an agreement made at the commencement of the trial, that the fees of the stenographer thus employed should be borne by the parties in equal proportions, each paying one half thereof. Although an extra copy was ordered by the referee, we see no reason why the costs should be taxed against the defendants. If the service was rendered on their order, it was still one fairly covered by the original agreement and was equally for the benefit of both litigants" (see also Newhall *v.* Appleton, 4 *Law Bul.* 5).

Adams *v.* N. Y. Lake Erie and Western (20 *Abb. N. C.* 180) was tried before LAWRENCE, J., and a jury, in the supreme court, first district, January, 1888, and the report of the case contains the following:

"In the absence of special agreement, all parties to an action are jointly liable to an unofficial stenographer employed to take the official records of proceedings before the referee and furnish parties with minutes of testimony" (see note to the case last cited).

Hasbrouck *v.* The Manhattan R. R. Co. (*unreported*) was brought in the court of common pleas and was tried before a referee, and the judgment was appealed from and affirmed at the general term of the Court. The same question which arises in these cases came up in that case. The clerk refused to tax the amount for stenographer's minutes, under the objection of counsel for defendants, and the plaintiff appealed from the taxation. The motion came on to be heard before Chief Justice DALY, and after a full argument of the question Judge DALY denied the motion, with costs, in the following opinion:

"The expense of procuring a copy of the stenographer's minutes in order to prepare amendments to a case on appeal has been allowed to a respondent upon taxation of his costs of the general term" (Stevens *v.* N. Y. El. R. R. Co., 31 *St. Rep.* 404; s. c.,18 *Civ. Pro. R.* 350; Sebley *v.* Nichols, 32 *How. Pr. R.* 182). "It has been

held, however, that it is only in the case of official stenographers that disbursements for their fees can be taxed, and that as to stenographers employed upon a reference, in the absence of a stipulation to that effect, their fees are not taxable as a disbursement" (Marx *v.* City of Buffalo, 87 *N. Y.* 184; Nugent *v.* Keenan, 53 *Supr. Ct. R.* 530). "The stenographer here was employed on a reference and there was no stipulation to tax his fees. Motion denied; $10 costs."

The case relied on by the respondent (Stevens *v.* N. Y. El. R. R. Co., *supra*) was tried before the court and is, therefore, inapplicable. In view of these adjudications the taxation by the clerk must be reversed and the item for stenographer's fees disallowed.

MACDONALD, Appellant, *v.* KIEFERDORF, KIRK *et al.*, Respondents.

N. Y. Court of Common Pleas, General Term; March, 1892.

§§ 23, 641.

Attachment—what objections to cannot be taken for first time on appeal —when should be vacated.

The objection that the moving papers of one applying as a junior attaching creditor for the vacation of a prior attachment did not show that any attachment has been obtained by him cannot first be taken on appeal from the order determining the motion, although, *it seems*, that if made on the motion it would have been fatal to the rights of the moving creditor to his right of making the application, unless the defect was supplied by an amendment then permitted by the court.

The objection that an irregularity for which an attachment is attacked is not specified with sufficient distinctness in the moving papers cannot be entertained for the first time on appeal.

The omission to state in a warrant of attachment the ground upon which it is issued is not a mere irregularity which may be supplied by amendment, but is a defect which renders the warrant void.

A warrant of attachment which recites the ground therefor merely that "defendant has departed from the city and state of New York" does not state any of the grounds for an attachment specified in the Code of Civil Procedure and is void and properly vacated.

First National Bank *v.* Bushwick (17 *N. Y. Civ. Pro.* 239) Worthington *v.* Dorsett (6 *N. Y. St. Rep.* 861, reversing s. c., *Daily Reg.*, Oct. 1886) followed.

It seems that where the form of a mandate is prescribed by the Code it must be substantially followed, otherwise the paper will be jurisdictionally defective and void; but that where the substantial rights of the defendant have not been violated, nor the rights of third persons prejudiced, the defect may be disregarded or supplied by amendment; that where a paper purporting to be a mandate recites the necessary jurisdictional facts the same will not be set aside because of erroneous recitals therein, particularly if the defect is not pointed out in the notice of motion as the ground of vacating the attachment; and that sheriffs in an action against them to enforce an alleged liability cannot attack the form of the mandate placed in their hands for enforcement.

(*Decided May* 2, 1892.)

Appeal by the plaintiff from an order of this court entered upon the motion of subsequent attaching creditors vacating a warrant of attachment herein.

On the first day of February, 1892, Nellie Macdonald, the plaintiff and appellant, procured a warrant of attachment against the property of Frederick F. Kieferdorf in this action, which was subsequently levied upon the property of the defendant. The warrant recited "that defendant has departed from the city and state of New York."

Subsequently Harford B. Kirk and others, composing the firm of H. B. Kirk & Co., the respondents—upon

an affidavit of their attorney alleging the granting of the said warrant of attachment in the above-entitled action on February 1, 1892, a copy of which he annexed to the moving papers, and also that in pursuance thereof the sheriff had made a levy on the stock and goods of the defendant; that on or about February 4, 1892, an action was commenced in this court, in which the respondents were plaintiffs, and the defendant herein, defendant; that on Februry 5, 1892, an attachment was granted in said last-mentioned action against the property of the defendant, upon the ground that defendant had departed from this state with intent to defraud his creditors or to avoid the service of a summons, and duly issued to the sheriff, who by virtue thereof attached the property of the defendant, and upon the sheriff's certificate that he had levied upon the property of the defendant by virtue of each of the aforesaid attachments—moved to vacate the attachment granted herein upon the ground that it fails to comply with sections 23 and 641 of the Code of Civil Procedure.

Upon the argument of the said motion, the appellant applied to the court "for leave to amend the said warrant of attachment by inserting therein a full statement of the grounds upon which the said warrant was granted, as required by section 641 of the Code of Civil Procedure," which application was denied, and the said motion was granted "upon the ground that the said warrant of attachment fails to comply with section 641 of the Code of Civil Procedure," and from the order entered thereon the plaintiff appeals.

Further facts are stated in the opinion.

S. F. Kneeland and *Henry M. Heymann*, for appellant.

Seth Sprague Terry, for respondent.

GIEGERICH, J.—The appellant seeks a reversal of the

order appealed from on the ground, among others, that the moving papers in this case do not show that any valid attachment had been obtained by the moving creditors, and that, therefore, the motion to vacate her attachment could not be entertained. Had such an objection been made in the court below, it would have been fatal to the right of the moving creditors to make such application (Tim *v.* Smith, 3 *Civ. Pro.* 347; *aff'd* 93 *N. Y.* 87; Williams *v.* Waddell, 5 *Civ. Pro.* 191; Bruen *v.* Gillet, 44 *Hun*, 298; Williams *v.* Cullen, 11 *St. Rep.* 283; Dayton *v.* The McElwee Mfg. Co., *N. Y. Law Journal*, Dec. 22, 1891), unless the defect pointed out was permitted to be supplied by amendment. But it would be manifestly unjust to permit such an objection to be raised for the first time on appeal, which the appellant had every opportunity to present in the court below, and which if made might have been met by strict legal proof of the subsequent lien (Tim *v.* Smith, *supra*); or if the court would not have permitted an amendment to supply such proof, it must have denied the motion without prejudice to a renewal of the application upon proper proofs and papers. Therefore, under the circumstances, the objection is not available on appeal in the first instance.

The appellant also insists that the particular irregularity is not specified in the moving papers. The order to show cause specifies with sufficient distinctness the grounds upon which the moving creditor moved the court to vacate the warrant of attachment herein; but conceding that the ground was not sufficiently pointed out, the record shows that this objection was not raised in the court below, where a full argument and hearing was had upon the merits; and under the authorities the objection cannot now be entertained for the first time (Livermore *v.* Bainbridge, 14 *Abb. N. S.* 227; Miller *v.* Kent, 10 *Weekly Dig.* 361; s. c. 59 *How.* 321.)

The appellant also insists that the omission of any of the requirements specified in section 641 of the Code

of Civil Procedure is a mere irregularity, and that such an omission may be supplied by amendment. It is difficult to see how such a construction can be placed upon these provisions of the Code, which are mandatory, as clearly appears by the following portion thereof, applicable to the case under consideration, viz.: "The warrant must be subscribed by the judge and the plaintiff's attorney, and must briefly recite the ground of the attachment" (*Id.*). The requisites of the warrant are thus prescribed, and it is manifest from the language of the statute that the legislature intended that, unless these provisions are complied with, the warrant shall be void.

This view is in accord with that of the codifiers, whose reasons for the additional requirements which now appear in section 641 of the Code are stated by Mr. Throop in his Notes on the New Code, at page 129, and in which he says that the additions to this section are modelled upon a corresponding section in Title I. (section 561.) In the note to section 561 he says the second and third sentences have been added, and that the former expressly requires the order to state the grounds of arrest, so as to harmonize the provision with similar provisions relating to other provisional remedies, and with section 568, whereby the plaintiff, in opposing a motion to vacate an order of arrest, made upon proof on the part of the defendant, is, in general, confined to the grounds of arrest recited in the order.

While section 561 was amended in 1877 so as to omit this requirement, it can make no difference in the reason given by the codifiers. It was manifestly their intention to require the ground to be recited in the warrant of attachment, as section 583 expressly provides that upon a motion to vacate an attachment, made upon additional affidavits, new proof on the part of the plaintiff may be made tending to sustain any ground for the attachment recited in the warrant and no other.

In the case at bar the warrant which was vacated substantially failed to recite the ground of the attachment. It merely recited that "defendant has departed from the city and state of New York." This is not one of the grounds specified in the Code for the granting of an attachment. A person has a perfect right to depart from the city and state of New York without subjecting his property to an attachment. In only two instances can an attachment be granted against the property of a person departing from the state, and those are, when he departs either with intent to defraud his creditors or to avoid the service of a summons.

We have not, after some research, been able to find any decision touching the precise point involved. We have been referred to the case of the First National Bank *v.* Bushwick Chem. Works (17 *Civ. Pro.* 229), which does not touch the point, and it, therefore, cannot be regarded as controlling. In that case an attachment was granted upon the ground that the defendant was about to fraudulently assign, secrete or dispose of its property, while the warrant recited that it had transferred and disposed of its property fraudulently. The court said this was irregular, but as the defect had not been pointed out in the notice of motion as a ground of vacating the attachment, it could not be taken advantage of.

The difference between that case and the one at bar is plain. There the warrant on its face was a good one, as it recited a ground recognized by the Code; but in the case at bar the warrant does not recite any legal ground whatsoever.

The case of Worthington *v.* Dorsett (6 *N. Y. State R.* 861, rev'g *Daily Reg.*, Oct. 5, 1886), which arose in the supreme court, is in harmony with the views above expressed. In that case the name of the judge who granted the attachment was omitted from the copy-warrant served. The defendants moved to vacate the at-

tachment, which was denied by the judge at chambers, who held that the omission referred to was a mere irregularity which it was the duty of the court to permit to be remedied, and was not a good ground for vacating the attachment. On appeal, the order denying the motion to vacate the attachment was reversed, and the paper purporting to be an attachment vacated.

The appellant has cited a number of cases, which have been carefully examined and considered; but none of them are at variance with the conclusions arrived at and hereinbefore expressed. As a result of such an examination of the cases so cited, and of those cited by the respondent, it is deemed to be not amiss to state that the following deductions have been drawn therefrom, viz.:

1. That where the form of a mandate is prescribed by the Code, it must be substantially followed, otherwise the paper will be jurisdictionally defective and void (Osborn *v.* McCloskey, 55 *How. Pr.* 345; Worthington *v.* Dorsett, *supra;* Place *v.* Riley, 98 *N. Y.* 1; and see Blossom *v.* Estes, 84 *N. Y.* 614).

2. But where the substantial rights of the defendant have not been violated, nor the rights of third persons prejudiced, the defect may be disregarded or supplied by amendment (Atlantic, etc., Tel. Co. *v.* Baltimore, etc., R. R. Co., 46 *Supr. Ct. R.* 377, 409).

3. Where the paper purporting to be a mandate recites the necessary jurisdictional facts, the same will not be set aside because of erroneous recitals therein, particularly if the defect is not pointed out in the notice of motion as a ground of vacating the attachment (First National Bank *v.* Bushwick, *supra*).

4. That sheriffs in an action against them to enforce an alleged liability as bail cannot attack the form of the mandate placed in their hands for enforcement (Douglass *v.* Haberstro, 88 *N. Y.* 611).

Inasmuch as the warrant in the case at bar was jurisdictionally defective, the order appealed from should be affirmed, with costs.

DALY, C.J., and BISCHOFF, Jr., J., concurred.

DODGE *v.* LAWSON.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL TERM; APRIL, 1892.

§ 820.

Interpleader—power of court on motion for—when denied because amount claimed not admitted.

The court is without power to settle the conflicting claims of parties on an application for interpleader under section 820 of the Code of Civil Procedure.

Where claim is made by two parties to the surplus arising upon a sale of certain bonds and one of them waives any tort in the transaction (so far as he is concerned) by suing for such surplus, the court cannot by ordering that the other claimant be interpleaded in the action compel him to waive any claim for tortious conduct by the defendant in the transaction, nor can it limit the amount of said claimant's demand for said act.

An interpleader cannot be ordered where the amount offered to be deposited by the defendants is less than that claimed by the plaintiff, although the defendants may in the judgment of the court offer the proper amount. The question must be determined on the trial of the motion and only be granted where the defendants admit the full and same amount claimed as due to one or the other of the claimants; even a dispute as to interest defeating the motion.

A motion for an interpleader cannot be granted where the defendant is a wrong-doer as to either party.

(*Decided April*, 1892.

Motion by the defendants that Charles W. Gould, as assignee of the firm of Field, Lindley, Weichers & Co., be interpleaded in the action and substituted as defendant in their stead.

The complaint alleges in substance that on and prior to November 30, 1891, plaintiff was the owner and entitled to the possession of $41,000 of negotiable railroad bonds of the value of about $30,750, with the 41 coupons thereon for $25 each, which were due by their terms December 1, 1891; that prior to those dates the plaintiff had delivered the bonds and coupons to Field, Lindley, Weichers & Co., as security for a loan; that, without plaintiff's knowledge or consent, said firm delivered said 41 bonds with 54 other like bonds and $100,000 of other railroad obligations to defendants, as security for the payment of loans aggregating $120,000; that the moneys obtained by Field, Lindley, Weichers & Co. were applied to their own use; that the 54 other like bonds and the $100,000 of other obligations were the property of the Union Pacific Railway Co; that on December 14, 1891, the amount and interest of the loans made by defendants to said firm aggregated $121,706.21; that on that day the Union Pacific Railway Co. paid defendants $96,116.66 on account of said sum, and received from defendants all of said securities excepting the 41 bonds of the plaintiff, leaving a balance due defendants of $25,589.55; that on the same day defendants sold plaintiff's 41 bonds for $29,110 and collected on his coupons $1,025, the last two items making together $30,135, which was applied by defendants in payment of the aforesaid balance of $25,589.55, leaving a surplus of $4,545.55, which the plaintiff seeks to recover.

The defendants claim that the sale and collections aggregated $29,673.75, instead of $30,135, as claimed by the plaintiff, and that the surplus, therefore, amounts to

$4,080.17, instead of $4,545.55, as alleged by the plaintiff.

The defendants admit their liability to the extent of $4,080.17 aforesaid, and allege that Field, Lindley, Weichers & Co. made a general assignment to Charles W. Gould, and that Mr. Gould has made claim to the surplus; that he cannot determine whether it should go to the plaintiff or to Gould, and, therefore, applies to deposit the surplus in court, to the end that the defendants may be discharged from liability to either claimant; that Gould may be substituted as defendant in their stead, that the respective interests of the two claimants may be determined, as upon interpleader, under section 820 of the Code.

The plaintiff objects to the application upon the ground that the demand made by him is for $4,545.55, and the sum admitted and proposed to be deposited amounts to only $4,080.17. Mr. Gould, the assignee, objects because the arrangement by which the 54 bonds and $100,000 of other railroad securities were returned to the Union Pacific Railway Co. was in violation of his rights; that the sale of the other securities was made without his assent; and that the sum proposed to be deposited in court, $4,080.17, is insufficient in amount, and that upon a proper settlement of the accounts a much larger sum will be found due.

A. W. Griswold, for defendants and motion.

Holmes & Adams for plaintiff, opposed.

Vanderpoel, Cuming & Goodwin, for assignee, etc., opposed.

McAdam, J.—The court is without power to settle the conflicting claims on an application for interpleader under section 820 of the Code (Lane *v.* N. Y. Life Ins. Co., 56 *Hun*, 92; Balt. & Ohio Co. *v.* Arthur, 90 *N. Y.* 234).

The plaintiff, by his form of action, has waived (so far as he is concerned) any tort by Field, Lindley, Weichers & Co., or by the defendants; but the court cannot compel the assignee of Field, Lindley, Weichers & Co. to waive any claim for tortious conduct by the defendants towards that firm in the aforesaid transactions, by substituting the assignee and exonerating the defendants from any other form of liability than that indicated by the nature of the present action, or limit the amount of their demand for such acts.

Nor can the court on a motion of this character ignore the method by which the plaintiff fixes the surplus at $4,545.55, and adopt that by which the defendants fix it at $4,080, even though the latter may in its judgment be the correct theory on which the figures ought to be made. That question must be determined at the trial. It is only where the defendant admits the full and the same amount claimed as due to one or the other of the claimants, that the motion can be granted (B. & O. Co. *v.* Arthur, *supra;* Bender *v.* Sherwood, 15 *How. Pr.* 258). Even a dispute as to interest will defeat the motion (Sibley *v.* Equitable, etc., Co., 56 *Super. Ct.* 274; s. c., 18 *St. Rep.* 834, 3 *N. Y. Supp.* 8).

The applicant must not be a wrong-doer as to either party (Shaw *v.* Coster, 8 *Paige,* 339; Morgan *v.* Fillmore 18 *Abb. Pr.* 217), or it will defeat his motion.

For the reasons stated, the application for interpleader must be denied, with $10 costs to be paid to the plaintiff, leaving the parties free to bring such action or suit in equity, with all the parties before the court, as they may deem best to settle the various conflicting rights, liabilities and equities that have been presented.

PEOPLE *ex rel.* CONNOR *v.* PURROY *et al.*, AS FIRE COMMISSIONERS OF THE CITY OF NEW YORK.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM; APRIL, 1892.

§§ 2125, 2133.

Certiorari—practice where writ not applied for in time.

Where a writ of certiorari is issued more than four months after the determination sought to be reviewed thereby, became final and binding upon the relator, the writ may, upon motion of the defendant, be quashed. The practice is not like that where the statute of limitations is sought to be taken advantage of, which can only be done by answer, but is more analogous to a case where an appeal is not taken in time, where the remedy is by motion, or to the case of a mechanic's lien in which it appears from the complaint that it was not filed within the statutory time, where a demurrer lies.

People *ex rel.* McNeary *v.* McLean (*unreported*), not followed. (*Decided April*, 1892.)

Motion to quash a writ of certiorari on the ground that said writ was not granted and served within four calendar months after the determination sought to be reviewed thereby became final and binding upon the relator.

William L. Findley, for respondents and motion.

Louis J. Grant, for relator, opposed.

BOOKSTAVER, J.—It is contended on behalf of the relator that section 2133 of the Code provides that "any

order may be made or proceeding taken in the case in relation to any matter not provided for in this article, as a similar proceeding may be taken in an action brought in the same court;" and that, as there is no special provision in the article as to procedure in case the writ is not served within the time prescribed, the proper course would be the same as in an action, which would be to set up the fact in the return; basing this claim upon section 413 of the Code of Civil Procedure, which provides that the statute of limitations can only be taken advantage of by answer, and that if the appellants desired to avail themselves of that provision, they should set it up in the return. This I do not think is sound, notwithstanding the opinion of the learned judge who decided The People *ex rel.* McNeary *v.* McLean (*unreported*). There is a broad distinction between the statute of limitations and the time provided by statute within which a proceeding must be instituted. In the former case, if the plaintiff is a non-resident, the statute does not run against him; and so in many other exceptions provided for by law. But in this case the statute makes no such exceptions. It is more analogous to the time given in which to take an appeal; if an appeal is not taken within the time limited, it may be dismissed on motion without waiting for the appeal to be heard So in the case of a mechanic's lien, if it should clearly appear upon the face of the complaint that more than ninety days had expired between the entire completion of the work and the filing of the lien, the complaint would be demurrable and the defect need not be taken advantage of by answer. And this is true of many other remedies, the time to take advantage of which is limited by law. In those cases the party seeking the remedy must bring himself within the statute before he can avail himself of it.

The motion should therefore be granted, with ten dollars costs.

DUNN *v.* HUETHER.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; APRIL, 1892.

§ 2339.

Committee of insane person—power of court to dispose of property or release dower.

The supreme court and in the city of New York the court of common pleas have jurisdiction over the property of a person incompetent to manage himself or his affairs in consequence of lunacy, idiocy or habitual drunkenness; but their power is limited by the provision of the title of the Code of Civil Procedure (§§ 2320–2340 inclusive) relating to the subject, and there is no expressed authority given the court, or the committee appointed by the court, to dispose of the property of the lunatic; the provision of section 2339, that the committee of the person or property of the lunatic is subject to the direction and control of the court by which it was appointed, with respect to the execution of his duties, cannot be construed to authorize the court to direct an extinguishing by the committee of the incoherent right of dower of the lunatic.

The court is not given expressed or implied authority to deprive a lunatic of her incoherent right of dower in her husband's property. The purchaser of land from the husband of a lunatic may properly refuse to accept a deed thereof executed by the husband and the committee of the lunatic, since said deed will not pass title free from the wife's dower.

(*Decided April* 14, 1892.)

Case submitted upon agreed statement.

The facts appear in the opinion.

B. J. Douras (*Sheehan, Southworth & Douras*, attorneys), for plaintiff.

Goldfogle & Cohn, for defendant.

INGRAHAM, J.—By title 6, art. 4, c. 17, Code, §§ 2320–2340 inclusive, this court is given the custody of the person and the care of the property of a person incompetent to manage himself or his affairs in consequence of lunacy, idiocy or habitual drunkenness, and in this city the court of common pleas has concurrent jurisdiction with this court as to the custody of the person and the care of the property of such persons. The power of the court, however, is limited by the provisions of this title, and there is no express authority given for the court, or the committee appointed by the court, to dispose of the property of the lunatic. Section 2339 provides that the committee, either of the person or the property, is subject to the direction and control of the court by which he was appointed, with respect to the execution of his duties; but this direction and control cannot be construed to authorize the court to direct an extinguishment by the committee of the inchoate right of dower of the lunatic.

There is no express provision as to the powers of the committee when appointed, but by section 2321 the court must preserve the lunatic's property from waste and destruction, and out of the proceeds must provide for the payment of his debts, and for the safekeeping and maintenance and the education, when required, of an incompetent person and his family; and section 2339 provides that the committee of the property cannot alien, mortgage or otherwise dispose of real property, except to lease it for a term not exceeding five years, without the special direction of the court, obtained upon proceedings taken for that purpose, as prescribed in title 7 of the chapter. I do not think that the court is by this title given any power to divest a lunatic of her inchoate right of dower in her husband's property; none certainly is expressly given, and I do not think it is

given by implication. Section 2348 provides for the application to sell the real property of the lunatic, and authority is there given to the court to order the sale, conveyance, mortgage or lease of the real property, or a term, estate or other interest in real property, belonging to the incompetent person.

It has been held in the case of Witthaus *v.* Schack (105 *N. Y.* 336) that an inchoate right of dower is not an interest in land at all, but is a contingent claim, arising, not out of contracts, but as an institution of law, constituting a mere chose in action, incapable of transfer by grant or conveyance, but susceptible only during its inchoate state of extinguishment, and such extinguishment can only be effected by the act of the wife in joining with her husband in the execution of a deed of land, by force of the statute. By section 16, c. 1, title 3, pt. 2, 1 *Rev. St.*, it is provided that "no act, deed or conveyance executed or performed by the husband, without the assent of his wife, evidenced by her acknowledgment thereof in the manner required by law to pass the estates of married women, . . . shall prejudice the right of his wife to her dower or jointure, or preclude her from the recovery thereof, if otherwise entitled thereto."

I think, therefore, that as this court, or the committee appointed by the court, is not directly authorized by statute to execute an instrument by which this inchoate right of dower shall be extinguished, and as the provision of the Code authorizing the sale of the lunatic's property does not include an inchoate right of dower, and as the provision of the Revised Statutes before cited provides that no deed of the husband, without the assent of the wife, shall prejudice the right of the wife to her dower, or preclude her from the enforcement thereof, the act of the committee in joining with the husband in executing a deed of the property in which the wife has such an inchoate right of dower would not extinguish such right, and that in consequence thereof the deed

tendered by the vendor would not pass a title in the grantee free from the wife's dower.

Huether is therefore entitled to judgment for the recovery of $500, with interest from October 17, 1891, together with the sum of $130, the amount agreed upon as the expenses for examining the title, and judgment should be ordered accordingly.

VAN BRUNT, P.J., and O'BRIEN, J. (concurring).—The papers submitted do not conform to the provision of the statute, in that no statement of facts is agreed to, and the submission is not in the form of an action; but as the questions have been examined, and we concur in the foregoing opinion, we have concluded so to decide the question.

RUTH, RESPONDENT, *v.* DAVENPORT, AS EXECUTOR, AND CARDWELL, AS EXECUTRIX, OF SAMUEL CARDWELL, DECEASED, APPELLANTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; APRIL, 1892.

§§ 1835, 1836.

*Costs—when executors not charged with in action against them.**

The general rule is that costs will not be awarded against executors in an action brought upon a claim against their decedent, and it is only in cases where the claim has been duly presented or the payment thereof unreasonably resisted, or the defendants

* See notes on costs in actions against executors and administrators, *ante*, p. 65, and note on costs on reference of claim against executors and administrators, 21 *N. Y. Civ. Pro.* 255.

refuse to refer as prescribed by law, that the court has power to award costs.

To sustain the conclusion that a claim against the estate of a decedent has been unreasonably resisted or neglected by his executor, the facts should show not only that the claim was presented, but also that the executor unreasonably resisted or neglected its payment.

Where, upon an application for costs in an action brought against an executor upon a claim against his decedent, it appeared that the payment of the claim had been orally demanded and that another action had been brought against one of the executors upon the claim which had been dismissed because the proper parties were not defendants,—*Held*, that there had been a sufficient presentation of the claim to entitle the plaintiff to costs if the payment had been unreasonably resisted or neglected, but that, as the claim was one for unliquidated damages for injury to property caused by water coming through a roof, and had been reduced from $3000 to $300, there was no unreasonable refusal or neglect to make payment.

Where a claim against the estate of a decedent is materially reduced upon the trial, the resistance made by his executor is not unreasonable and costs cannot be awarded to plaintiff because of such resistance.

(*Decided April* 14, 1892.)

Appeal by the defendants from an order of the New York county special term allowing the plaintiff costs of action, and also from that part of the judgment in this action directing the recovery of costs by the plaintiff.

This action was brought by the plaintiff against the defendants, as executor and executrix of Samuel Cardwell, deceased, to recover damages for injuries to property caused by the leaking of water through the roof of premises leased by the plaintiff from Samuel Cardwell, Jr., the decedent's son, which lease together with a leasehold in the premises owned by Samuel Cardwell, Jr., had been assigned by him to the decedent.

Other facts are stated in the opinion.

Charles H. Otis, for defendants, appellants.

Albert I. Sire, for plaintiff, respondent.

O'BRIEN, J.—As shown by this title, this is an action against executors, which, after a trial, resulted in a verdict for plaintiff, for which, in addition to costs and an allowance, he was permitted to take judgment. From so much of the judgment as granted costs and allowance this appeal is taken, and, inasmuch as the action of the court was based on a stipulation made between the parties, which recites the facts, it is necessary to set forth the same at length.

This stipulation was as follows: "On or about the 13th day of March, A.D. 1889, the plaintiff commenced an action against William B. Davenport, as executor of the last will and testament of Samuel Cardwell, Jr., to recover damages occasioned by the rain coming upon the plaintiff's property, as described in the complaint in this action; that the said action was tried, the complaint dismissed, went to the general term, and a new trial ordered by the general term; that the second trial came on in June, 1891, before Hon. CHARLES H. TRUAX and a jury, and the complaint was dismissed on the ground that the wrong party had been sued; that the said William B. Davenport and Sophia Cardwell are executors of the last will and testament of Samuel Cardwell, Sr.; that this action was commenced in the month of July, A.D. 1891, to recover the sum of $3000 for the same damages claimed in the prior action against William B. Davenport, as executor of the last will and testament of Samuel Cardwell, Jr., and has now resulted in a verdict for the plaintiff for the sum of $300 damages; that no claim has ever been presented either to William B. Davenport, as executor of the last will and testament of Samuel Cardwell, Jr., or to William B. Davenport and Sophia Cardwell, executors of the last

will and testament of Samuel Cardwell, Sr., or to either of them, except that an oral demand was made, and in so far as a presentation of the said claim was involved in the bringing of the actions above recited; that the defendants in this action, or either of them, have never offered or refused to refer the claim of the plaintiff as prescribed by law."

Section 1835 and 1836 of the Code prohibit the allowance of costs, unless the claim against the estate was duly presented, or the payment thereof unreasonably resisted, or the defendant refused to refer as prescribed by law; either of which conditions existing, the court may, in its discretion, adjudicate costs in favor of the plaintiff (Hopkins *v.* Lott, 111 *N. Y.* 579).

The general rule, therefore, is that costs shall not be awarded against executors, and it is only in cases where one of the conditions has been fulfilled by the plaintiff that the court has power to award costs.

The stipulation shows, as well as the conclusion of the learned trial judge, that two of the three conditions essential to awarding costs were wanting in this case—namely, the presentation of plaintiff's demand to the executors, and the refusal of the executors to refer the claim. This leaves the third, which was the ground upon which the court based its action—namely, that it appeared that the payment of the claim was unreasonably resisted or neglected by the defendant. To sustain this conclusion, it was necessary that the facts should show not only that the claim was presented, but also that the executors unreasonably resisted or neglected its payment. When we consider the fact that the same attorney who appears here also appeared in the former action brought against the executors of plaintiff's original lessor, and that upon such trial the nature, character and extent of the claim were developed, and knowledge thereof brought to these defendants, coupled with the fact that the stipulation itself concedes that an

oral demand was made, these together, we think, would have justified the conclusion of the learned court that the claim was presented, it not being absolutely essential to comply with this condition that a formal claim should have been presented. Taking, however, the character of the claim itself, it being one for unliquidated damages for injuries to property caused by water coming through a roof, and the fact that the claim made of $3000 was reduced by the recovery had to $300, it cannot be claimed that by a failure to pay the original amount it was unreasonably refused or neglected.

It is to be regretted that, in a case presenting the facts such as appeared in this action, we cannot find authority to support the conclusion reached by the learned trial judge; for, after considering the amount of time and labor, and the action pursued by the same attorney who appears here for the defendants, and who appeared in the former trial for the executors of decedent's assignor, in withholding knowledge of the real owners of the property, which necessitated the several trials, and required the plaintiff, without fault on his part, from want of knowledge as to the real party in interest, to pay costs almost equal in amount to the recovery here, these considerations, were it the question of the exercise of a discretion vested in a judge, would here have been rightly and justly exercised in granting costs and allowance.

We have been referred to some cases wherein it was held that some slight difference in the amount claimed and the amount recovered did not prevent the granting of costs, but we have found none where, as here, the action was one to recover unliquidated damages, and the amount was reduced from $3000 to $300 as the result of resistance, and such action on the part of the executors in not paying the claim was held to be unreasonable. We regard the law as well settled by a long line of authorities that, when a claim against the estate of a

deceased debtor is materially reduced upon the trial, the resistance made by the executor is not unreasonable.

Considering, therefore, the nature of the claim itself and the material reduction obtained, we are of opinion, as matter of law, that the court was without power to award costs and grant the allowance, and for this reason, solely, the order and so much of the judgment appealed from should be reversed, without costs.

VAN BRUNT, P.J. and INGRAHAM, J., concurred.

MOFFATT, APPELLANT, *v.* FULTON *et al.*, RESPONDENT.

COURT OF APPEALS, SECOND DIVISION; MAY, 1892.

§ 549.

Pleading—when insufficiency of complaint not properly objected to—when defendant may be arrested in action to recover money or property converted.

In an action to recover proceeds of certain money alleged to have been converted by the defendants, the objection that there is no express averment in the complaint that the money in question was received by the defendants in a fiduciary capacity cannot first be taken on appeal; such objection is not taken on the trial by a motion to dismiss upon the ground that the first count did not contain facts sufficient to constitute a cause of action, and particularly that it did not set forth facts constituting an action in tort, and that the second count did not set forth facts constituting a cause of action either in tort or on contract, and that the complaint united an alleged cause of action based upon the theory of tort with one on the theory of contract.

The amendment of sections 549 and 550 of the Code of Civil Procedure made in 1886, requiring that the facts upon which the right to arrest a defendant in a civil action depend should be stated in

the complaint in all cases except the single one provided as a substitute for the old writ of *ne exeat*, introduced no new rule of pleading into the Code which changed the nature of certain causes of action somewhat by requiring facts to be alleged and proved in addition to those previously required to be alleged or proved in order to recover, and it does not authorize the pleader to allege the conclusions of law instead of the plain and concise statement of facts required by section 481.

Where the complaint in an action alleged that the plaintiff intrusted his two notes to the defendants as his agents, to return one with no expense and to discount the other and return the net proceeds to him, they exceeded their authority and discounted both of said notes, received the proceeds and refused to pay them over on demand and converted them to their own use, and this fact was substantially proven on the trial,—*Held*, that both the allegations of the complaint and the evidence show that defendants had received money of the plaintiff while acting in a fiduciary capacity and converted it to their own use, and that there was no necessity for alleging in express terms in the complaint; that the money had been received in a fiduciary capacity. (BRADLEY and PARKER, JJ., dissenting.)

Where it is a necessary inference from the fact alleged in the complaint that money was received by the defendants in a fiduciary capacity, the statute does not require that it should be labelled by that name.

Agency is a fiduciary relation, and property received as agent is received in a fiduciary capacity, and when the property is turned into money, that is also received in fiduciary capacity.

Moffatt *v.* Fulton (56 *Hun*, 337) reversed.

(*Decided February* 8, 1892.)

Appeal from a judgment of the general term of the supreme court in the first judicial department, modifying and affirming as modified a judgment entered on a verdict directed at circuit.

This was an action to recover the proceeds of two promissory notes, belonging to the plaintiff, claimed to have been received by the defendants in a fiduciary capacity and converted to their own use.

In the first count of the complaint it is alleged that on the 15th of November, 1886, the plaintiff, a manufac-

turer of New Haven, Conn., gave to the defendants, who were engaged in business in the city of New York, his promissory note for $908.75, payable three months thereafter, in consideration of goods sold and delivered. On the 15th of February, 1887, shortly before said note became due, the plaintiff made another note dated that day, but in all other respects a duplicate of the first, and sent it by his agent, one McDowell, to the defendants with the request that they should indorse it "and have it discounted for cash and remit the funds, less any reasonable charges for commissions and discount, to plaintiff immediately, so that he might pay the said note of November 15th, about to become due, and to use the proceeds of said note for no other purpose whatsoever. The defendants thereupon informed the said McDowell that they could not have the said note discounted, but if the plaintiff would send them in its place his note for a less amount, paying a portion of the indebtedness represented by the said note of November 15, 1886, they would immediately have the same discounted and remit the proceeds for the purpose above described. Said defendants requested the said McDowell to leave with them said note dated February 15, 1887, and stated that they would inclose the same on that day to the plaintiff in a personal letter explaining the facts, . . . and use said note for no other purpose. Trusting solely to the honesty and integrity of said defendants, said McDowell left said note with them for the purpose of having it returned immediately to the plaintiff and for no other purpose." The defendants never returned the note, but procured the same to be sold or discounted through a broker to an innocent holder, and on the 21st of February, 1887, received the proceeds of said note, less twenty-one dollars and nineteen cents, deducted for commission and discount, "in trust to pay the same to the plaintiff forthwith." They used said proceeds in their own business and refused to pay any part thereof to the plaintiff,

to his damage "in the sum of $887.60, with interest thereon from the 21st day of February, 1887."

The plaintiff alleged in the second count of his complaint that on the 17th of February, 1887, he made his promissory note, bearing the date of February 8, 1887, for $750.60, payable to the defendants, three months after date; "that thereupon the defendants requested the said plaintiff to deliver said note to the defendants to take the place of the note of February 15, 1887, referred to" in the first count of the complaint, "and for the purpose therein more fully set forth, agreeing to indorse said note, have the same discounted or sold, and return the proceeds thereof to the plaintiff forthwith, less the discount and a reasonable commission." In accordance with said request, and relying on said agreement, the plaintiff "thereupon . . . delivered said note to the defendants . . . in trust, to indorse and discount or sell the same for cash, and forthwith to pay the proceeds thereof to the plaintiff, less the discount and commission, as aforesaid, and for no other purpose whatever." The defendants indorsed the note and procured a bank to discount it, and on the 4th of March, 1887, the proceeds, less $8.57 charged for discount and commission, were paid to them, and they used the same for their own purposes, refusing upon due demand to pay any part thereof to the plaintiff, to his damage in the sum of $742.09.

The summons and complaint were served only on the defendant Fulton, who appeared and answered, pleading, in substance, a general denial, and also a counterclaim, which was successfully demurred to by the plaintiff, on the ground that it alleged "facts constituting a cause of action arising on contract, while the cause of action arising out of the facts alleged in the complaint is in tort and not on contract."

Upon the trial the allegations of the complaint were substantially proved, and the defendant introduced no

evidence. It appeared that the plaintiff paid all of said notes at maturity, and that when McDowell left the first note with the defendants they said they would try to have it discounted, and if they succeeded would send the proceeds to the plaintiff, but otherwise they would return the note to him that night, with a letter of explanation. When the plaintiff left the second note with them they said that there was some doubt whether they could get the other discounted and hence they asked for the smaller one.

At the close of the evidence the defendant moved to dismiss the complaint "on the ground that the facts proved do not constitute either a tort, an actionable conversion or the fiduciary relation in respect to either cause of action." The motion was denied, and he thereupon moved that a verdict be directed in his favor on the same grounds. That motion was also denied and a verdict was directed in favor of the plaintiff for $1,789.07, being the net proceeds of the two notes with interest, upon the ground "that the money was received in a fiduciary capacity." The trial judge also held that the facts alleged were "sufficient to maintain a cause of action for a conversion." Judgment was entered accordingly, and at the end of the *postea* was this provision: "But this judgment can be enforced only against the joint property of the defendants herein and the separate property of the said defendant, Robert Fulton, who was served as aforesaid, and against the person of the said defendant, Robert Fulton." The defendant Fulton appealed from the entire judgment, and the general term modified it by striking out the words "and against the person of the said defendant, Robert Fulton," but affirmed it in all other respects. The plaintiff appealed to this court from that part of the judgment of affirmance which modified the judgment of the trial court.

Henry W. Taft, for plaintiff, appellant.

Arthur R. Robertson, for defendant, respondent.

VANN, J.—The Code provides that a defendant may be arrested in certain actions, and, among others, in an action brought to recover damages for "a personal injury; an injury to property, including the wrongful taking, detention or conversion of personal property; a breach of promise to marry; misconduct or neglect in office or in professional employment; fraud or deceit; or to recover a chattel, where it is alleged in the complaint that the chattel has been concealed" in a certain manner and with a certain intent; "or to recover for money received, or to recover property, or damages for the conversion or misapplication of property, when it is alleged in the complaint that the money was received or the property was embezzled or fraudulently misapplied by a . . . factor, agent, broker or other person in a fiduciary capacity. Where such allegation is made, the plaintiff cannot recover unless he proves the same on the trial of the action" (*Code Civ. Pro.* § 549).

The general term based its judgment of reversal upon the ground that there was no express averment in the complaint that the money in question was received by the defendants in a fiduciary capacity, although one of the learned judges dissented from that conclusion (Moffatt *v.* Fulton, 56 *Hun*, 337; 31 *St. Rep.* 154). No such point, however, was taken at the circuit. The sufficiency of the complaint was not questioned upon the trial, except by a motion to dismiss, made before any evidence was given, upon the ground that the first count did "not contain facts sufficient to constitute a cause of action, and particularly that it did not set forth facts constituting an action in tort;" that the second count did "not set forth facts constituting a cause of action either in tort or on contract," and that the complaint united "an alleged cause of action proceeding upon the theory of tort with one proceeding on the theory of con-

tract." The motion at the close of the evidence was not based upon the facts alleged, but on "the facts proved." Even, therefore, if it was necessary to specifically allege that the money was received by the defendants as agents in a fiduciary capacity, advantage could not be taken of the omission for the first time upon appeal (Lounsbury *v.* Purdy, 18 *N. Y.* 515; Cowing *v.* Altman, 79 *Id.* 167; Knapp *v.* Simon, 96 *Id.* 284). If the point had been raised, a formal amendment might have been allowed.

But, assuming that the question was properly raised, we do not think that it called for a reversal of the judgment rendered by the trial court, because it is sufficient to set forth the facts showing that the money was received in a fiduciary capacity, without copying the words of the statute, which would be pleading a mere conclusion of law. It was clearly the intention of the legislature by its last amendment of section 549 to require a plaintiff, intending to arrest the defendant, to predicate his action upon some ground of wrong-doing mentioned in the statute, as a substantive part of the cause of action, so that he could defend himself before a jury and recover costs if such defense was successful. (Laws 1886, chap. 672; *Code Civ. Pro.* § 549). The statute does not direct the plaintiff to state in his complaint that he claims the right to arrest the defendant. Such a statement in order to be effective as a notice would have to appear in the summons rather than the complaint, as the former must, while the latter need not be, personally served. No change was made where the right to arrest depended on the nature of the action, as in the case of fraud, deceit, conversion and injuries to person or property. The right of arrest, however, as it had previously existed, in so far as it depended upon extrinsic facts, that is, upon facts not appearing in the complaint, was changed, except as provided in section 550, which is a substitute for the old writ of *ne exeat*, not by abolishing the right of arrest, but by requiring

the facts, which theretofore had been stated in part outside of the complaint, to be stated in it as a part of the cause of action. The practice was thus made uniform, so that the complaint must now set forth the facts upon which the right to arrest depends in all cases, with the single exception aforesaid, just as formerly it was required in a majority of cases. The amendment, as we construe it, introduced no new rule of pleading into the Code. It did not authorize the pleader to allege a conclusion of law instead of the "plain and concise statement of facts" required by section 481.

It changed the nature of certain causes of action somewhat, by requiring facts to be alleged and proved in addition to those previously required to be alleged or proved, in order to recover. If, therefore, the complaint under consideration sets forth facts showing that the defendant, as agent, received the proceeds of the two notes in a fiduciary capacity, and converted them to his own use, it is sufficient, without characterizing those facts or repeating the language of the statute. The facts, as alleged, were in substance that the plaintiff intrusted his two notes to the defendants, as his agents, to return one with certain explanations and to procure the other to be discounted and forthwith remit the net proceeds to him. Exceeding their authority as to one note, they procured both to be discounted, received the proceeds, refused to pay them over on demand and converted them to their own use. The facts as proved were substantially the same, except that the defendants were authorized to procure the discount of either note and to return the other, with the net proceeds of the one discounted. The notes belonged to the plaintiff, and when they were discounted the proceeds belonged to him. The defendants had no right to either, except as the agents of the plaintiff. Agency is a fiduciary relation. It exists by virtue of the *fiducia*, or faith reposed, as where one man, confiding in another, intrusts

his property to him for a particular purpose, and in the belief that he will in good faith use it for no other purpose. Property thus received is received in a fiduciary capacity, and when the property is turned into money, that is also received in a fiduciary capacity. It does not belong to the agent, who can lawfully exercise no power or authority over it, except for the benefit of his principal, and only as authorized by him. If the agent uses it for his own purposes, or fails to pay it over upon a seasonable demand duly made, it is a conversion of that which does not belong to him. The capacity in which the defendants received the notes was fiduciary in character, because it depended upon trust and confidence reposed in them by the plaintiff, as his agents (Goodrich *v.* Dunbar, 17 *Barb.* 644, 646; Republic of Mexico *v.* De Arangoiz, 5 *Duer*, 640; Wolfe *v.* Brouwer, 5 *Robt.* 601).

He trusted them to handle his property as he directed, and they agreed. After they had received the money on the notes, they had no right to keep it, or even to pay it out on his account, but it was their duty to at once pay it over to him. They received it in trust for him, and the refusal to pay it over was not a refusal to pay a debt, but to deliver that which belonged to him. Under the circumstances this was not a mere "act of omission," but "an act of misfeasance." The transaction was isolated and independent of any custom or course of dealing.

The complaint alleges that the proceeds of the first note "were received by him in trust to pay the same to the plaintiff forthwith," and that the second note was delivered to him "in trust to indorse and discount or sell the same for cash, and forthwith to pay the proceeds thereof to the plaintiff." When it is a necessary inference from the facts alleged that the money was received in a fiduciary capacity, the statute does not require that it should be labelled with that name.

Since there was no agreement as to the method of transmitting the proceeds, the expectation of the plaintiff that the defendants would deposit them in their bank account, and remit by check, is not important. They did not attempt to remit in any way.

While some parts of the judgment as rendered by the trial court may be subject to criticism, we have not alluded to them, because only the part that was stricken out on appeal is before us for review.

After examining the exceptions to which our attention has been called, we think that the judgment of the general term, in so far as it modified the judgment of the circuit, should be reversed, with costs.

PARKER, J. (dissenting).—An examination of the question presented leads me to adopt the view entertained by the majority of the court at general term (Moffatt *v.* Fulton, 56 *Hun*, 337, s. c., 31 *St. Rep.* 154).

The question has been before that court, and with the same result, on other occasions (Hillis *v.* Bleckert, 53 *Hun*, 499; 25 *St. Rep.* 553; Bartlett *v.* Sutorius, 17 *N. Y. Civ. Pro.* 259; Harland *v.* Howard, 32 *Id.* 872).

The judgment of the trial court awarded to the plaintiff $1,789.07 and costs, and authorized its enforcement out of the joint property of the defendants, the separate property of the defendant Fulton, and against the person of Fulton.

The general term modified the judgment by striking therefrom the words "and against the person of the said defendant, Robert Fulton," on the ground that the complaint does not specifically allege that Fulton received the money in a fiduciary capacity.

The appellant insists that the requirements of the Code are met when the facts alleged warrant the conclusion that the money was received in a fiduciary capacity.

A portion of subdivision 2, section 549 of the Code

of Civil Procedure, forms the basis of the different views contended for.

The section so far as pertinent to the present discussion provides that "a defendant may be arrested in an action as provided in this title, where the action is brought for either of the following causes: (1) To recover a fine or penalty; (2) To recover damages for a personal injury; an injury to property, including the wrongful taking, detention or conversion of personal property; a breach of promise to marry; misconduct or neglect in office or in professional employment; fraud or deceit; or to recover a chattel, where it is alleged in the complaint that the chattel or a part thereof has been concealed, removed or disposed of so that it can not be found or taken by the sheriff, and with intent that it should not be so found or taken, or to deprive the plaintiff of the benefit thereof; or to recover for money received, or to recover property, or damages for the conversion or misapplication of property, where it is alleged in the complaint that the money was received or the property was embezzled or fraudulently misapplied by a public officer or by an attorney, solicitor or counsellor, or by an officer or agent of a corporation or banking association in the course of his employment, or by a factor, agent, broker or other person in a fiduciary capacity. Where such allegation is made, the plaintiff cannot recover unless he proves the same on the trial of the action; and a judgment for the defendant is not a bar to a new action to recover the money or chattel."

It will be observed that it is plainly provided that, in order to bring a case within the scope of that section, it must be alleged in the complaint that the money was received in a fiduciary capacity; and in determining whether it should receive a technical construction, requiring such an allegation in terms in addition to the plain and concise statement of facts provided for by section 481 of the Code of Civil Procedure, or simply a

statement of the facts, we may inquire as to the probable intent of the legislature.

Prior to the enactment of chapter 672 of the Laws of 1886, section 549 providing for cases where the arrest depended exclusively on the nature of the action, and section 550 relating to those where the right to arrest depended, in part at least, on facts extrinsic to the cause of action, subdivision three of the latter section provided for a case of money received in a fiduciary capacity and misapplied. The cause of action was *ex contractu*, the right of arrest extrinsic, and if an allegation of conversion was also made it was treated as surplusage and not issuable (Segelken *v.* Meyer, 94 *N. Y.* 473–484; Donovan *v.* Cornell, 8 *Civ. Pro.* 283; Greentree *v.* Rosenstock, 61 *N. Y.* 583–590).

The order of arrest could only be granted on the pleadings and affidavits; the right to it was not an issuable fact, but contestable only on affidavits; and if not granted before judgment rendered, an execution against the person could not issue (Wood *v.* Henry, 40 *N. Y.* 124).

In 1886 section 550 of the Code was amended, among other respects, by striking out the provisions relating to actions for money in a fiduciary capacity and misapplied, and section 549 was amended by its incorporation into subdivision 2, but with an important change in its phraseology, in that it required that an allegation to that effect should be made in the complaint and proved on the trial, if made and not proved plaintiff to fail of recovery.

The effect of this amendment was not to change the cause of action from contract to one of tort, but to change the remedy. As we have observed, prior to such amendment the right to issue an execution against the person in actions of this character was made to depend on an application by the plaintiff for an order of arrest based on appropriate affidavits before the entry of judg-

ment. The defendant had a right to contest such application by means of opposing affidavits, and the judge determined from such papers and the pleadings whether a proper case was presented for an order of arrest. If granted and not subsequently vacated, execution issued against the person in the event of plaintiff's recovery. The jury were thus prevented from considering whether the circumstances entitled a plaintiff to a remedy against the person as well as the property of the defendant. Their duty was fully performed when they had determined what sum, if any, was due the plaintiff; the court having already decided if applied to, and on other papers in part, whether the plaintiff was entitled to the additional remedy which the issuing of an order of arrest gave.

It may tend to show the purpose of the legislature, if in this connection, we briefly examine chapter 672 of the Laws of 1886. The first and second sections amend sections 549 and 550 of the Code of Civil Procedure in the respects already sufficiently alluded to for our present purpose. Section 3 amends section 551 of the Code, so as to conform the practice in granting and serving orders of arrest to sections 549 and 550, as by such act amended.

Section 4 amends section 558 of the Code so as to provide, among other things, that when the order of arrest is applied for, after the filing or service of the complaint, the court may, before granting the same, direct the service of an amended complaint, so as to conform to the allegations required in subdivisions 2 and 4 of section 549. It may be remarked in this connection that only subdivisions 2 and 4 of section 549 provide for allegations in the complaint in addition to those requisite to establish a cause of action, and that a judgment may be recovered if they are omitted, but the remedy against the person does not, in such case, flow from it.

Section 5 amends or substitutes for section 111 of the Code a section limiting the term of imprisonment in jail under an execution against the person; limiting the period which a person may be imprisoned within the jail liberties of any jail; prohibiting further imprisonment in the same action, and making it the duty of the sheriff to discharge a person imprisoned at the expiration of the periods provided for without any further application therefor.

Section 6 amends section 572 of the Code so as to provide for the discharge of the debtor from custody in certain cases of unwarrantable delays, the plain object of the section being to relieve the debtor from continued and extended imprisonment, whether by virtue of separate mandates in the same or different actions.

Section 7 provides that the act shall apply to all imprisoned debtors under any mandate against the person heretofore issued, and commands the sheriffs of the several counties to discharge, within five days from the passage of the act, all persons entitled to discharge by the provisions of section 111 of the Code of Civil Procedure, as amended.

It is apparent, therefore, that the purpose of the legislature in amending the several sections of the Code of Civil Procedure in the manner provided by chapter 672 of the Laws of 1886 was in the direction of personal liberty.

Before the amendment, a person who misapplied moneys obtained in a fiduciary capacity was subject to arrest on an order granted before judgment, and to be taken in execution against the person after.

The creditor still has the same remedy, but the procedure is changed. Formerly he only had to state in his pleading a plain and concise statement of the facts, and on the trial need prove nothing more. Whether he was entitled to an order of arrest, carrying with it a right to an execution against the person of his debtor, depended

on the affidavits presented to the judge, and his view of their sufficiency.

But now, as I interpret the section under consideration in the light of the apparent intent of the legislature, as manifested by the other provisions of the act creating the amendment, an order of arrest cannot be obtained unless the complaint alleges in addition to a plain statement of the facts that the money misapplied was obtained in a fiduciary capacity.

The plaintiff makes the allegation at his peril, for if he fails to prove it to the satisfaction of the jury, judgment must go against him in a case when but for such allegation the jury would be required to find an indebtedness to the plaintiff on the part of the defendant.

The object of the amendment seems to have been to give a defendant charged with misappropriating moneys received in a fiduciary capacity (1) specific notice that the plaintiff seeks a remedy against his person; (2) the benefit of an ordinary trial by jury, with the privilege of adducing oral testimony, and of cross-examination of adverse witnesses upon the facts involving the right of arrest; (3) such advantage as may accrue because of the plaintiff's knowledge that if he fail to satisfy the jury that the facts entitle him to a remedy against the person of the defendant, judgment for costs will be rendered against the plaintiff.

It is not contended by those differing with the construction heretofore given by the courts to section 549, that it was not framed with a view to insure to a defendant apprisal by the complaint that a remedy against his person is sought. But it is urged that he may be said to be so apprised if the allegations of the complaint warrant the conclusion which the Code says must be alleged. Some of the reasons have already been given which have led me to the conclusion that the legislature intended to, and did, provide for an allegation so specific as to give the defendant ample notice that he must be

prepared to contest with the plaintiff the facts involving the right of arrest as well as the alleged indebtedness, and it may not be amiss to call attention to the argument, which the situation of this case presents, in support of the wisdom of the legislature in providing for an allegation which insures to the defendant actual notice that a remedy beyond a judgment for money is sought.

It is now about to be held in effect, if not in terms, that the causes of action averred in the complaint are not in tort, but *ex contractu*, because for money had and received in a fiduciary capacity (Segelken *v.* Meyer, 94 *N. Y.* 474–484), and that the complaint being susceptible of such a construction the defendant must be deemed to have been notified by it that a remedy against his person was sought. Yet in this very case the defendant pleaded a counterclaim, to which the plaintiff interposed a demurrer in which he assigned, among other grounds of demurrer, "that it appears on the face of said counterclaim that it is not of the character specified in section 501 of the Code of Civil Procedure, in that it alleges facts constituting a cause of action arising on contract, while the cause of action arising out of the facts alleged in the complaint is in tort and not on contract."

After argument the demurrer was sustained and judgment thereon rendered in favor of the plaintiff.

Now, can it be that a complaint which the plaintiff by his demurrer asserted was in tort, an assertion which the court after argument made sustained by its judgment, may be said to have apprised the defendant that on the trial he should be prepared to meet the charge that a recovery was claimed for money received in a fiduciary capacity? It seems to me not, and that it was to provide against just such cases that induced the legislature, in part at least, to require that in addition to the statement of facts there should be a specific allegation which should with certainty inform a defendant of the extent of the remedy sought against him.

Other instances might be cited tending to show that the evident purpose of the legislature will not be effectuated if the section of the Code under consideration be so construed as to render it unnecessary to aver in the complaint the allegation declared to be essential in case a remedy against the person is sought.

But it will serve no useful purpose to multiply them. The legislature clearly intended to take a further step in the direction of personal liberty; and to that end deemed it essential that a defendant should have explicit notice that other than a money judgment is claimed; that he should have the right to contest the charge of breach of trust before a jury, and to prevent the charge from being lightly made and on insufficient grounds it imposed as a penalty for failure to substantiate the allegations required to be pleaded that the plaintiff should fail of recovery.

The judgment should be affirmed.

BRADLEY, J. (dissenting).—I think to justify execution against the person of a defendant it is sufficient that the inference from the allegations of the complaint is necessarily in support of a cause of action authorizing it. It is otherwise if there is opportunity for other or contrary contention. In my view such a cause of action is not necessarily the effect of the allegations of the second count. And the fact that those of the first count would alone be sufficient for it, does not warrant such final process (Miller *v.* Scherder, 2 *N. Y.* 262).

The judgment, therefore, should be affirmed.

Judgment of general term in so far as it modified the judgment of the circuit, reversed, with costs.

All concurred, except BRADLEY and PARKER, JJ., dissenting.

GILMAN, APPELLANT, *v.* PRENTISS *et al.*, RESPONDENTS.

COURT OF APPEALS, SECOND DIVISION; APRIL, 1892.

§ 1022.

Findings—when omission of, prevents review on appeal.

Where upon the trial of the issues in an action before a referee evidence was offered by both sides, and the case finally submitted to the referee, who dismissed the complaint,—*Held*, that the finding of fact and the conclusion of law should have been made by the referee, and that their absence prevented a review of the case in the court of appeals and required the dismissal of an appeal from the judgment entered therein.

Wood *v.* Lary (124 *N. Y.* 83); Place *v.* Hayward (117 *N. Y.* 487); Forbes *v.* Chichester (125 *N. Y.* 769); Bridger *v.* Weeks (80 *N. Y.* 328), followed.

Gilman *v.* Tucker (18 *N. Y. Civ. Pro.* 50) appeal dismissed.

(*Decided April* 26, 1892.)

Appeal by the plaintiff from a judgment of the general term of the superior court of the city of New York affirming a judgment in favor of the defendants entered upon the report of a referee.

The facts sufficiently appear in the opinion.

Charles E. Hughes (*George H. Fletcher*, attorney), for plaintiff, appellant.

Charles H. Hardy (*Tucker, Hardy & Wainwright*, attorneys), for defendants, respondents.

PARKER, J.—Before any evidence was taken the defendant Tucker moved to dismiss the complaint. The

motion was not passed upon, the referee reserving his decision. After the plaintiff rested, the defendant again made a motion to dismiss the complaint, but no ruling was made, the referee again reserving decision. The defendants thereafter introduced evidence, both oral and documentary, in support of their position, and rested. The motion to dismiss the complaint was not then nor thereafter renewed. The plaintiff called several witnesses in rebuttal, and was permitted to amend his complaint on terms, after which the testimony was closed, and the "case summed up and submitted" to the referee. Subsequently the referee made a report dismissing the complaint, which report did not contain any findings of fact; nor did he at any time make, nor was he requested to make, any such findings, the plaintiff contenting herself by filing exceptions to the report.

The question is, therefore, presented whether the judgment can be reviewed because of the failure of the referee to comply with section 1022 of the Code of Civil Procedure, which provides that "the decision of the court or the report of the referee, upon the trial of the whole issue of fact, must state separately the facts found and the conclusion of law." This neglect of the referee, if neglect it was, could have been remedied at the instance of the plaintiff in the manner provided by the Code, but no attempt was made in that direction. Indeed, the plaintiff did not even submit to the referee a written statement of the facts which she deemed established by the testimony.

We held in Wood *v.* Lary (124 *N. Y.* 83) that, in every case heard by a referee, if any evidence be presented, a decision stating separately the facts found and the conclusions of law based thereon must be made; otherwise the judgment will not be reviewed.

Place *v.* Hayward (117 *N. Y.* 487) does not oppose, but supports, such determination. In that case the defendant's counsel, at the close of plaintiff's evidence,

without announcing that he had rested his case, asked for and obtained a dismissal of the complaint. Afterward the referee made his report, containing findings of fact and of law. It was held that what the referee did was to nonsuit the plaintiffs, and therefore he should have made no findings of fact, except such as would justify a nonsuit. Judge EARL, speaking for the court, said: "Under the Code, the referee was required to make findings of fact and of law after granting the nonsuit, but he had no right to make any findings of fact depending upon disputed or inconclusive evidence." That it was the view of the court that, in case of a nonsuit before a referee, the facts found must be in accord with the testimony, most strongly supporting the plaintiff's contention, is evidenced not only by the discussion of facts, with which the opinion abounds, but also by the sentence following the one last quoted: "Therefore, to maintain this judgment, the defendant is bound to show that there was no disputed question of fact which, upon a jury trial, the court would have been required to submit to the jury, and that upon the undisputed evidence he was entitled to judgment."

In Forbes *v.* Chichester (125 *N. Y.* 769) the referee made a report dismissing the complaint, to which the plaintiff's counsel excepted, and then Judge EARL remarks, in his opinion: The referee "made formal findings of fact and law, as he should have done, and proper exceptions were taken to them by plaintiff's counsel." It seems to be settled, therefore, that findings of fact are necessary, even when the complaint is dismissed at such a stage of the hearing as to entitle it to be treated as a nonsuit. It is certainly not the less important that the statutory requirement in such respect should be insisted upon when the testimony is all in, the arguments of counsel made, and time for deliberation by the court or referee taken.

In such a case this court held in Bridger *v.* Weeks

(30 *N. Y.* 328) that the judgment would not be reviewed, and, so far as we have observed, the position then taken has been steadily maintained. The appeal should be dismissed.

All concurred, except BRADLEY, J., not voting, and LANDON, J., dissenting.

GRIGGS, APPELLANT, *v.* DAY AND ANOTHER, AS SURVIVING EXECUTORS, ETC., OF CORNELIUS K. GARRISON, DECEASED, RESPONDENTS.

SUPERIOR COURT, GENERAL TERM; MAY, 1892.

§ 3296.

Referee's fees—stipulation permitting referee to fix amount of, invalid.

A stipulation that a referee before whom an action was tried should fix the amount of his fees, is not such a fixing of his rate of compensation by consent of the parties as is contemplated by the statute, and is not binding upon them.

First Nat'l Bank *v.* Tamajo (77 *N. Y.* 476); Mark *v.* City of Buffalo (87 *Id.* 184) followed.

(*Decided May* 2, 1892.)

Appeal by plaintiff from an order of the special term denying a motion for a new taxation of costs.

On the taxation of plaintiff's costs, the defendants objected to the item of $7500, the fee paid to the referee before whom the action was tried. The plaintiff claimed the right to tax said charge, under a stipulation whereby it was agreed "that the referee shall not be limited

to the statutory fee of six dollars per day for his services in this case, but may charge such fees therefor as he deems proper." The stipulation was reduced to writing and subscribed by the parties to the action. The case involved large interests, and was calculated to consume much of the referee's time, and was of such exceptional character that it was next to impossible to determine in advance what a reasonable compensation would be. The referee rendered his services, and the plaintiff paid the sum fixed by the referee in good faith and in reliance upon the stipulation. There is nothing to show that the charge is unreasonable. On the contrary, the nature of the litigation, the magnitude of the interests, the amount involved, the importance of the case, the voluminous testimony to be considered, the intricacy of the questions presented, all indicate that the sum charged is not extravagant, but fair compensation, commensurate with the labor expended. Indeed, the only objection urged against the charge is that it was not taxable because the stipulation failed to specify any specific rate of compensation. The clerk sustained the objection, and the special term judge, on appeal from the clerk's ruling, affirmed the action of the clerk.

R. G. Ingersoll and *J. H. Post*, for plaintiff, appellant.

William R. Bronk, for defendants, respondents.

McAdam, J.—It is a maxim of the law that that is certain which may be made certain—*certum est quod certum reddi potest* (*Co. Litt.* 43; 1 *Bouv. Law Dict.* 214, subd. 3); and an agreement that the value of work done shall be fixed by a third person is valid, and the amount so fixed recoverable (see Delaware & H. C. Co. *v.* Pennsylvania C. Co., 50 *N. Y.* 250). The circumstance that the parties agreed that the value should be fixed by the referee would apparently lead to the conclusion that the

sum so fixed was equally obligatory, unless the statutory provision as to referee's compensation, or the judicial nature of the position of referee, make it improper that he should determine the question.

Section 3296, Code, provides that a referee shall be paid six dollars for each day spent in the business of the reference, unless a different rate of compensation is fixed by consent of the parties.

The court of appeals construed this section in Bank *v.* Tamajo (77 *N. Y.* 476), and in Mark *v.* City of Buffalo (87 *N. Y.* 184), by holding that the parties could not agree to leave the referee to decide the measure of his compensation, as that left the subject open and indefinite and did not fix the different rate authorized by the Code provision before referred to. It has been urged that the determination of that point was unnecessary to the decision of either of those cases, and the remarks in reference thereto merely *dicta.* The suggestion is not without reason, yet the proposition decided is so clearly enunciated in the first case, and plainly reiterated in the second, that it would seem almost going counter to our appellate tribunal to hold that that court did not intend to do precisely what it did in language too plain to be misunderstood.

Good faith, however, would seem to require that where parties have deliberately entered into a written stipulation, and one has been induced on the faith thereof to part with $7500, the other party to the contract should be rigidly held to its terms, for, if not so held in this instance, the appellants must lose $7500 by the bad faith of the defendants in successfully repudiating their solemn obligation. None of the cases intimate that the agreement is contrary to public policy, and good morals would appear to require that it, like other contracts, be enforced according to its terms. It does seem that where parties have, by a written agreement, stipulated that the referee shall fix the amount of

his fees, they have expressly waived the statutory limit of six dollars per day, and have substituted a different rate of compensation—one not fixed by the Code, but equally certain, because the amount was to be determined in a mode agreed upon by the parties, and which was equally as specific when once fixed as if the exact amount had been specified in the agreement itself.

This view of the law was sustained by a majority of the court in Burt *v.* Oneida Community (Sup.; 12 *N. Y. Supp.* 806), which would be followed but for the fact that the rulings made by the court of appeals in the two cases cited are so clearly opposed to the decision in Burt *v.* Oneida Community, *supra*, that we feel constrained to respect its construction by affirming the order appealed from, with costs.

SEDGWICK, Ch.J., concurred.

FATMAN, RESPONDENT, *v.* FATMAN, INDIVIDUALLY AND AS EXECUTOR, ETC., OF JOSEPH FATMAN, DECEASED, APPELLANT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM; MAY, 1892.

§ 870 *et seq.*

Examination of party before trial—sufficiency of affidavit—scope.

Where in an action brought by a legatee against an executor and trustee for an accounting, in which it appeared that the decedent was a member of a firm and had an interest in it to the extent, as shown by an inventory filed by the defendant, of $275,000, and that the personal property of the estate was $327,797.29, the plaintiff secured an order for the examination of the defendant before trial upon an affidavit setting forth these facts and also that the plaintiff had no knowledge of any source of information, except the testimony of the defendant and other

partners of the said decedent, as to what were the terms, provisions and conditions of their articles of copartnership, oral or written, nor as to who were members at the time of the death, nor what was the extent of decedent's interest in the assets of the firm, nor what had been the operation of the firm since his death as affecting his interest in the assets, nor what changes, if any, had taken place in the membership of said firm since his death, nor in what respect said changes had affected the interest of the decedent and of his executor and trustees in the assets, nor what, if anything, was left in the trust fund created by the provisions of the will in the assets of the firm, nor any of the facts or incidents connected with and created by the provisions under said will, and that said deposition was necessary and material to the plaintiff in the prosecution of the action, and that the plaintiff could have no knowledge of the assets, nor of anything concerning said trust under the will or its administration, nor concerning any part of the estate or its administration, except by said testimony, and that it was necessary for plaintiff to frame his complaint,—*Held*, that a motion to vacate an order was properly denied when the affidavit was sufficient to justify an order for the examination of the defendant before trial.

It is not necessary that an affidavit to procure an order for the examination before trial should state a complete cause of action, but it is sufficient if the nature of the action and the substance of the judgment demanded are set forth.

While, *it seems* that the court of common pleas cannot entertain jurisdiction of an action brought simply for an accounting as to personal property, it has such jurisdiction where the accounting is to relate both to personal and real property.

The Statute of Limitations is an affirmative defense, and the fact that apparently the Statute of Limitations has run and barred an action upon a claim, is no reason for vacating an order for the examination of the defendant before trial for the purpose of enabling the plaintiff to prepare his complaint.

The scope of an examination of a defendant before trial should not be limited where the testimony is to be taken before a judge and not before a referee.

(*Decided May* 2, 1892.)

Appeal from an order of the special term of this court denying a motion to vacate or modify an order made herein for the examination of the defendant to enable the plaintiff to frame his complaint in this action.

The facts are stated in the opinion.

J. A. Shoudy, for appellant.

William J. Hardy, for respondent.

GIEGERICH, J.—Joseph Fatman, father of both plaintiff and defendant, died in October, 1869. He was then a member of the firm of Fatman & Co., of New York City. By his will he directed his executor to represent his interests in said copartnership, and, to all intents and purposes, carry out said copartnership in the same manner as though the testator were living, during the period provided for in the articles of copartnership, and that the said partnership should continue and be prosecuted by the remaining partner and his executor.

The defendant became the sole executor under his father's will, and in January, 1870, about three months after his father's death, filed an inventory showing personalty of the appraised value of $327,797.29, including the testator's interest in the firm of Fatman & Co., which was appraised at $275,000.

The plaintiff demanded from the defendant an accounting and the payment to him of his share of his father's estate; but the defendant refused to comply with the demand, and the plaintiff now brings this action for the purpose of obtaining a judgment establishing and adjudicating the rights of the plaintiff in the real and personal estate of his father, and requiring and directing the defendant, as sole executor and trustee of said Joseph Fatman, deceased, to file and judicially settle his account, and to pay over to the plaintiff his share in the proceeds of the said estate as a legatee of the said testator.

Upon the affidavit of the plaintiff setting forth these facts and other facts and circumstances, which will hereinafter more fully appear, an order was made for the

examination of the defendant to enable the plaintiff to frame his complaint. Thereafter the defendant moved to vacate, set aside or modify such order, which application was founded upon his affidavit, wherein he states that the firm of Fatman & Co. was dissolved by his father's death; that its affairs were liquidated by Louis Fatman, as surviving partner; "that all of the assets of said firm and of both partners were used to pay the debts of said firm, and that, after all had been applied, left over half a million of indebtedness unpaid;" that in 1869 a new firm, composed of the defendant individually and the said surviving partner Louis Fatman, was organized for one year; that it received none of the assets of the former firm and had no connection with its business; that in 1870 "a new firm of Fatman & Co." was organized, composed of Louis Fatman, Solomon J. Fatman, Morris Ranger, and Solomon Ranger; that about 1882 Morris Ranger retired and about 1883 Louis Fatman died, and the firm is now composed of the remaining members; that none of the assets of the original firm of Fatman & Co. ever came into the hands of this firm; that about the year 1877 all of the assets of Joseph Fatman, together with his interest in the assets of the original firm of Fatman & Co., had been collected by the defendant and said Louis Fatman, and paid out upon account of the indebtedness of his said firm; that since 1877 no assets whatever of the said Joseph Fatman have come into his hands nor those of said Louis Fatman, nor have any such assets ever come into the hands of either of said "subsequent firms of Fatman & Co.;" and that the plaintiff's right to demand an accounting accrued upward of twenty years ago.

The defendant also alleged that in July, 1890, the plaintiff applied to the surrogate for an order directing him to render an account in the estate of said Joseph Fatman, and that the application was denied upon the ground that the plaintiff's right to demand such an ac-

counting had long since expired. The statements of the defendant as to the alleged result of the proceedings had in the surrogate's court are denied by the attorney for the plaintiff, who in an affidavit alleges that they were discontinued before any determination was reached therein.

The motion made by the defendant was denied, from which determination he has appealed, and thus there is presented for review the validity of the order in question.

It is insisted by the defendant that the affidavit was wholly insufficient to justify an order for the examination of the defendant. There is no force in this contention. The affidavit upon which the order was made contains, in addition to the matter above stated, the statement that the plaintiff has no knowledge nor any source of information, excepting the testimony of the defendant and the other copartners of said Joseph Fatman, deceased, as to what were the terms, provisions and conditions of the said articles of copartnership, oral or written, nor as to who were copartners of the said Joseph Fatman in the said firm at the time of his death, nor what was the extent of the interest of the said Joseph Fatman in the assets of the said firm, nor what has been the result of the operations of the said firm since the death of the said Joseph Fatman as affecting the latter's interest in the said assets, nor what changes, if any, have taken place in the membership of the said firm since the death of the said Joseph Fatman, nor in what respect such changes in said firm have affected the said interests of the said Joseph Fatman, deceased, and of his executor and trustee in the assets of said firm, nor what, if anything, is now left of the trust fund created by the said provisions of the said will in the assets of said firm; nor any of the other facts or incidents connected with the ad-

ministration of his said trust by the said executor and trustee under the said will.

It was further stated that the deposition of the defendant is material and necessary to the plaintiff in the prosecution of this action, and that the plaintiff has no means of ascertaining anything whatsoever concerning the said trust under the said will or its administration or concerning any part of the estate of said testator or its administration, and that this discovery is necessary to enable the plaintiff to discover the names of other defendants and to frame his complaint in this action. From these statements and others, as they are contained in the affidavit, the plaintiff is clearly entitled under the authorities to an order for the examination of the defendant (Glenney *v.* Stedwell, 64 *N. Y.* 120; Heishon *v.* Knickerbocker Co., 45 *Super.* 34; Raymond *v.* Brooks, 59 *How.* 383; Miller *v.* Kent, *Id.* 321; Manby *v.* Bonnell, 11 *Abb. N. C.* 123; Goldberg *v.* Roberts, 12 *Daly*, 339; Burt *v.* Oneida Com., 21 *Week. Dig.* 342; Davis *v.* Stanford, 37 *Hun*, 531; Talbot *v.* Doran & Wright Co., 30 *State Rep.* 559; 18 *Civ. Pro.* 304, 9 *N. Y. Supp.* 478; Carter *v.* Good, 57 *Hun*, 116: 32 *State Rep.* 501), and the plaintiff is entitled thereto especially in view of the fact that he is a *cestui que trust* and entitled to a full and truthful disclosure affecting the *corpus* of the estate (Carter *v.* Good, *supra*).

The second objection to the order is, that the affidavit fails to show that the plaintiff has a cause of action, either legal or equitable. Even assuming for the purposes of the argument that this is so, the general rule does not apply to a case of this character (Carter *v.* Good, *supra*). But it is not necessary that the affidavit should state a complete cause of action; it is sufficient if the nature of the action is stated and the substance of the judgment demanded (Frothingham *v.* Broadway R. R. Co., 9 *Civ. Pro.* 304, 314, VAN BRUNT, J., Vidette *v.*

Dudley, 24 *State Rep.* 20; Heishon *v.* Knickerbocker Co., *supra*).

The moving papers in the case at bar contain these prerequisites.

The third objection is that the examination of the defendant is not necessary to enable the plaintiff to frame his complaint. A question similar to the one now presented by this objection was raised by the first objection, which has been already considered and disposed of, and the answer thereto might suffice for a complete answer to the objection now raised. But in passing upon the precise point involved, it is well to consider that while the plaintiff may be entitled to a share of his father's estate, he is not in a condition in which he can legally state his case entitling himself to any relief of that description. For the information requisite for that purpose he is wholly dependent upon the defendant, who, it seems, within three months after the testator's death, and before his inventory was filed, became a member of the firm, which by the terms of his father's will he was directed to continue and preserve; and without the information there is reason to believe that the action could not be placed in the legal form adapted to the relief which the plaintiff is entitled to upon the facts as he may ultimately be able to establish them in the suit. The plaintiff is, therefore, entitled to the order to enable him to prepare a complaint (Davis *v.* Stanford, *supra;* Raymond *v.* Brooks, *supra;* Tucker *v.* Mather, *supra;* Heishon *v.* Knickerbocker Co., *supra*).

This brings us to the next objection, that it is doubtful whether the plaintiff could maintain an action for an accounting in this court. If the action related solely to an accounting as to the personalty, doubts might be entertained, in view of the intimations given by the judges who delivered the opinion of the court in the cases cited by the appellant (Hard *v.* Ashley, 117 *N. Y.* 606; Chipman *v.* Montgomery, 63 *Id.* 321), whether in the face of

an objection properly taken thereto this court could entertain jurisdiction of the action. But by referring to the affidavit of the plaintiff it will be seen that this action is brought "for the purpose of obtaining a judgment establishing and adjudicating the rights of plaintiff in certain real and personal property, being the estate of one Joseph Fatman, deceased."

The statements and denials of the defendant contained in his affidavit furnish no reason why he should not be examined at the instance of the plaintiff (Olney *v.* Hatcliff, 37 *Hun*, 286; Davis *v.* Stanford, *supra*).

Notwithstanding the long period of time that has elapsed since the alleged right of action is claimed to have accrued, the Statute of Limitations is always an affirmative defense, and it cannot be presumed that the same will be pleaded. Furthermore, the facts to be brought out may themselves show that such statute could not be successfully interposed as a defense.

The scope of the examination of the defendant should not be limited, as the order provides it is to be taken before a judge and not a referee (Burt *v.* Oneida Com., *supra;* Hutchinson *v.* Lawrence, 29 *Hun*, 450).

The order appealed from should be affirmed, with costs.

DALY, C. J., and BISCHOFF, Jr., J., concurred.

JOURDAN, RESPONDENT, *v.* HEALEY AND ANOTHER, APPELLANTS.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM; JUNE, 1892.

§ 3057.

District court in city of New York—use of affidavits on appeal from —when justice may adjourn action after trial commenced.

The provision of section 3057 of the Code of Civil Procedure that "where an appeal is founded upon an error of fact in the proceedings not affecting the merits of the action and not within the knowledge of the justice, the court may determine the matter upon affidavits, or, in its discretion, upon the examination of witnesses, or in both methods," applies exclusively to appeals from justices' courts, and does not apply to an appeal from a district court in the city of New York;[1] but even if it did apply, it would not authorize the use of affidavits on an appeal based upon an alleged error consisting of the refusal of the justice to adjourn the trial, where the error was fully within the knowledge of the justice on the trial, and he denied the motion to adjourn on the ground that he had no power to grant it.[2]

A justice of a district court in the city of New York has ample power to adjourn the trial of a cause to another day where, upon its trial, the plaintiff, suing upon a contract of employment, testified that the contract was made with one of the defendants personally, and it appeared that such testimony was a surprise to the defendants—that it was a custom of the defendants' house that all such contracts should be made by its foreman; and, therefore, said defendant was not in court, and a motion for such adjournment is promptly made.[3, 4]

Edwards *v.* Drew (2 *E. D. Smith*, 55); Aberhall *v.* Roach (11 *How. Pr.* 95); Wight *v.* McClave (3 *E. D. Smith*, 316); Story *v.* Bishop (4 *Id.* 423); Giberton *v.* Ginochio (1 *Hilt.* 218); Redfield *v.* Florence (2 *E. D. Smith*, 339) distinguished.[4, 6]

Jourdan *v.* Healey.

It seems that in a justice's court a case may be adjourned from one day to another, or held open for a reasonable time to procure the attendance of a witness, and that the matter of continuing the case is in the sound discretion of the justice.[5]

In such case, justice demands that a new trial should be had, even though no error of law has been shown.[6]

Curley *v.* Tomlinson (5 *Daly*, 283) followed.[6]

(*Decided June*, 1892.)

Appeal by defendants from a judgment in favor of the plaintiff, rendered in the district court in the city of New York for the third judicial district.

Robert Thorne, for defendants, appellants.

Emile B. Morel, for plaintiff, respondent.

BOOKSTAVER, J.—Although the appellant has appealed from the judgment rendered in the court below, he relies chiefly upon an error in fact in the proceedings at the trial, and upon the argument presented affidavits setting forth what he regarded as such error.

For this procedure, appellant relies upon section 3057 of the Code of Civil Procedure, which provides that "where an appeal is founded upon an error [1] in fact in the proceedings not affecting the merits of the action and not within the knowledge of the justice, the court may determine the matter upon affidavits, or, in its discretion, upon the examination of witnesses, or in both methods;" but after a careful examination we are convinced that this section refers exclusively to appeals from justices' courts, and not to appeals from district courts. This section is a part of article I., title 8th of the Code, which relates exclusively to appeals from justices' courts. As far as we have been able to discover, no such provision is made for appeals from the district courts of this city.

But if the section under consideration did apply, we

think the alleged error shown in the affidavits is not covered by the provisions of that section. The errors in fact referred to in that section relate to some in-
[2] capacity of the party, such as infancy, coverture, or some irregularity in the service of process, or misconduct of the jury, or other error not within the knowledge of the justice at the time of the trial (Biglow *v.* Sanders, 22 *Barb.* 147, 149; Adsit *v.* Wilson, 7 *How Pr.* 64, 68, 69; Kasson *v.* Mills, 8 *How Pr.* 377; Hurd *v.* Beeman, *Id.* 254; Wavel *v.* Wiles, 24 *N. Y.* 635, 637). But the error complained of was fully within the knowledge of the justice on the trial, and he denied the motion to adjourn on the ground that he had no power to do so.

From the return it appears that the action was brought by the plaintiff against the defendant to recover wages which the former claims to have earned
[3] from the latter under a contract made, as he claimed on the trial, with the defendant Healey personally. As all contracts of that character, according to the custom of the house, were made, not by Mr. Healey, but by defendants' foreman, who was present at the trial, and as the pleadings did not disclose that it was claimed to have been made with either of the defendants personally, we think they were not guilty of negligence in not having Mr. Healey present as a witness, and it is apparent from the return that the testimony of the plaintiff was a surprise to the defendants, and they immediately moved for an adjournment for a time long enough to procure the attendance of Mr. Healey. This the court below refused, on the ground that it had no power to adjourn a case after trial commenced except by consent.

The learned judge who made this decision doubtless had in mind, at the time of rendering it, the cases of Edwards *v.* Drew (2 *E. D. Smith*, 55); Aberhall *v.* Roach (11 *How. Pr.* 95); Wight *v.* McClave (3 *E. D. Smith*, 316);

Story *v.* Bishop (4 *Id.* 423); Giberton *v.* Ginochio (1 Hilt. 218); Redfield *v.* Florence (2 *E. D. Smith*, 339), decided in this court, which abundantly sustain his ruling.

[4] But all of these were decided before the act of 1857 (chap. 334, par. 778), which expressly provided that "the trial of an action or special proceeding may be continued from day to day, or from one day to another day or days, until the same is finished." This provision was retained in the consolidated act of 1882. We think it gives the district judge ample power to adjourn a case, under circumstances like these, for a sufficient time to procure the attendance of witnesses, if, in his discretion, he thinks such an adjournment should be granted; and from the return it appears that the justice did think so, as he said, on denying the motion, "If I had such a right, I should certainly give you an opportunity to bring Mr. Healey."

Although not necessary to a decision in this case, it may be added that even in justices' courts it has been held that after amendment it was discretionary

[5] with the justice to grant an adjournment or not on the ground of surprise (Sherar *v.* Willis, 5 *Lans.* 329). So, too, it was long ago held that it was a matter of discretion on the part of the justice to hold a case open in order to allow one or the other parties to obtain witnesses, and that it was not error to do so for a period of two hours (Pease *v.* Gleason, 8 *Johns.* 409). And in Day *v.* Wilber (*Colman & Caine's Cases* 381, 385) it was held that it was not error to continue the case from the 2d of June, when the venire was returned, to the 3d of that month, when the cause was tried; and on appeal in that case it was said: "There is nothing in the law to prohibit a justice from continuing his court from one day to the next when the exigencies of the case require it;" although it is true that in Green *v.* Angel (13 *Johns.* 469) it was decided that, under the circumstances in that case, holding it open for twenty hours to

procure the attendance of a witness was unreasonable. It therefore seems that the matter of continuing the case is in the sound discretion of the justice. (See also *Cowen's Treatise*, pars. 1219, 1220.)

But, in addition to this, it may be said that the decisions of this court above cited were rendered when it had no power to grant a new trial, as it now has, [6] and, on a review of this case, we are of the opinion that justice requires a new trial should be had, even if no error of law had been shown, under Curley *v.* Tomlinson (5 *Daly*, 283).

Judgment reversed and new trial ordered, with costs to appellant to abide the event.

BISCHOFF, J., concurs.

KNOCH *v.* FUNKE, JR.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL TERM; MAY, 1892.

§§ 757, 3271.

Reviving action against an executor of deceased defendant—when security for costs may be required.

The court may, as a condition of reviving an action in equity against the executrix of a deceased defendant, require the plaintiff to give security for costs.

The right to continue a suit in evuity, under section 757 of the Code of Civil Procedure, after the death of a sole defendant, against his personal representative, is not absolute and unqualified, but must be determined according to settled equitable considerations.

Knoch *v.* Funke.

Requiring securities for costs in an action by or against an executrix is purely discretionary with the court, and it may be required in such cases even pending an appeal.

It seems that a court of equity has an inherent power to require security for costs from a plaintiff even in a case not within the words of the statute.

(*Decided May*, 1892.)

Motion by plaintiff for a reargument of an application to revive a suit in equity.

The facts appear in the opinion.

E. Grosse, for plaintiff and motion.

Austin Abbott, for defendant, opposed.

McAdam, J.—The court, upon application of the plaintiff, made an order reviving the action against the executrix of the defendant "upon condition that the plaintiff file security for costs." The plaintiff moves to reargue the motion upon the ground that the condition imposed was unauthorized and in conflict with the decision of the supreme court in Sullivan *v.* Remington S. M. Co. (27 *Hun*, 276; s. c., 2 *Civ. Pro. R.* 68), and that this court should follow the rule laid down in that case, or give some reason for not doing so.

The Code provision (section 757) that the court "must upon motion" allow the action to be continued, merely means that in a proper case the relief shall be granted. It does not mean that the court must unconditionally grant every application to revive that is presented. If that were intended, no motion would be required; it would be sufficient to file a suggestion and go on as at common law. The very object of requiring a motion is to preserve the inherent power of the court, merely simplifying and facilitating the mode of its exercise.

The practice of requiring security for costs (like that of allowing persons to sue *in forma pauperis*) originated in the equitable doctrines of the court of chancery controlling its own process and proceedings for the purpose of doing justice and preventing injustice.

It was adopted by the late supreme court of this state by rule 14, January, 1798. In the Revised Statutes (2 *R. S.*, 1*st Ed.*, 619) the practice was sanctioned by statute for all the courts, and made more positive by the words "the defendant may require" such plaintiff, etc., to file security (see note of the revisers explaining the statutory adoption of the practice).

It was perfectly well settled under the Revised Statutes that the power of the court was not limited by these provisions (People *v.* Common Pleas, 18 *Wend.* 652). The supreme court in equity supplemented the statute by a rule of practice, which forbids even the filing of a bill in a case where defendant would be entitled to security for costs until security had first been given, unless the suit could be prosecuted by a solicitor, in which case the solicitor should be liable to the amount of $100 (see S. C. rule No. 2, of 1847). The old equity jurisdiction of the courts was preserved by the Code (section 217), so that the powers theretofore exercised may be used now.

The inherent power of the court, even in actions at law, was equally well established as unrestrained by the statute.

In Swift *v.* Collins (1 *Den.* 659), which was an action of *assumpsit*, a motion by defendant for security for costs was made (although the plaintiffs resided within the state) on the ground that they were insolvent and a non-resident claimed to be the owner of the demand. Defendant's counsel claimed that the case was within the equity of the statute. Plaintiffs' counsel relied on the fact which plaintiff's counsel here relies on, that it was not within the words of the statute. The order was

granted. The court, by BEARDSLEY, J. (following People *v.* Common Pleas, *supra*), said: "It is not necessary to inquire whether this case is within the words of the statute, for the power to require security for costs is inherent in the court."

In this instance the representative of a deceased defendant is involuntarily brought into a litigation by a new proceeding instituted for the purpose, and the estate he represents should be reasonably protected as to costs of defense. Requiring security in an action by or against an executor is purely discretionary (*Code*, section 3271; Tolman *v.* S. B. & N. Y. R. R. Co., 92 *N. Y.* 353; Fish *v.* Wing, 1 *Civ. Pro. R.* 231), and security in such cases may be required even pending an appeal (Gedney *v.* Purdy, 47 *N. Y.* 676; Gifford *v.* Rising, 48 *Hun*, 128; Nat. Ex. Bank *v.* Silliman, 4 *Abb. N. C.* 224). The right to continue a suit in equity, under section 757 of the Code, is not absolute and unqualified, but must be determined according to settled equitable considerations (Coit *v.* Campbell, 82 *N. Y.* 509; Lyons *v.* Park, 111 *N. Y.* 350; Hayer *v.* Nourse, 114 *N. Y.* 595). The court, in the exercise of its equitable jurisdiction, had the power (in reviving the action) to attach the condition that the plaintiff give security.

The order was properly made, and the motion for reargument must be denied, with $10 costs.

FELDMAN AND ANOTHER, APPELLANTS, *v.* GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN OF THE STATE OF NEW YORK, RESPONDENT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; MAY, 1892.

§§ 427, 820.

Interpleader—claim must have some reasonable foundation—notice of application—amount of deposit.

To entitle a defendant in an action, to have one claiming the money or property in suit substituted as a defendant by order of interpleader, there must be some reasonable foundation for the claim asserted. The question on a motion for interpleader is as to whether there is a reasonable doubt as to the safety of the stakeholder in paying over the money, and such reasonable doubt must be supported by proof raising a question upon which the court may pass judicially, and the claim must have some foundation in law.

Instance of a case in which the right to an order of interpleader was doubtful (INGRAHAM, J., dissenting).

Nassau Bank *v.* Yandes (44 *Hun*, 55) followed.

An order interpleading persons claiming moneys sued for, and substituting them for the defendant in the action, cannot be made unless notice of the application for the order has been given all the persons sought to be interpleaded. (INGRAHAM, J., dissenting,—*Held*, that where notice was given one who claimed the moneys, the court could join as a party defendant any person who had or claimed an interest in the controversy adverse to the plaintiff, and who is a necessary party defendant for the complete determination or settlement of the questions involved.)

An order directing an interpleader and substitution as defendants persons claiming moneys sued for, should provide for the payment into court not only of the principal sum claimed and

sued for, but also, where interest is demanded, of such interest to the date of the payment.

Where the court orders, third persons claiming one half of the moneys sued for in an action to be interpleaded and substituted in place of the defendant, *it seems* that the whole sum claimed in the complaint should not be deposited in court, but the original defendant should be required to pay the part as to which there was no dispute to the person entitled to it, and to deposit the balance.

(*Decided May* 13, 1892.)

Appeal by plaintiffs from an order of the special term in New York county directing that Babette A. Dobler and others be interpleaded and substituted as defendants, and that the original defendant be discharged upon the payment into court of $2000.

This action was brought by Tillie Feldman and Frank Joseph Anton Dobler, an infant by said Tillie Feldman, his guardian *ad litem*, to recover the sum of $2000, with interest from December 28, 1891.

The complaint alleges the appointment on December 26, 1891, of the guardian *ad litem* for the infant plaintiff; that the defendant is a domestic corporation; that on or about June 23, 1891, the defendant issued to one Anton Dobler, of New York city, a beneficiary certificate containing the following provision: "That Brother Anton Dobler, a workman degree of 'Our Own' Lodge, numbered 298 of said order, located at New York in the state of New York, is entitled to all rights and privileges of membership in the Ancient Order of United Workmen, and to participate in a beneficiary fund of the order to the amount of $2000, which sum it has been directed to pay to Frank Joseph Anton Dobler and Tillie Dobler, son and wife, share and share alike;" that said Anton Dobler had complied with all the laws, rules and requirements of said order, and said certificate was duly executed; that said Anton Dobler departed this life on October 24, 1891, leaving in the possession of the plaintiffs

the said beneficiary certificate; that due proof of his death has been satisfactorily made to the defendant, which has signified its willingness to pay over the sum of $2000, but withholds the same in consequence of a notice from Babette A. Dobler, claiming said fund and prohibiting its payment to the plaintiffs; that for six years immediately preceding the death of the said Anton Dobler, the plaintiff Tillie Feldman and said Anton Dobler dwelt and cohabited together as man and wife, she believing him to be unmarried; that the issue of said union is the infant plaintiff; that at the time said Anton Dobler so lived with the plaintiff Tillie Feldman he had a wife living, namely, the said Babette A. Dobler, to whom he had been married upwards of twenty years, and for that reason the plaintiff Tillie Feldman adopted her maiden name in the prosecution of the action; and that the said certificate of membership was applied for and taken out of the said order for the sole benefit of these plaintiffs, and they are the real and lawful beneficiaries thereunder."

The defendant before answering applied for an order substituting Babette A. Dobler, Charles Dobler, Anton Dobler, Albert Dobler, Tillie Maehlein, Herman Dobler, Elizabeth Dobler and William Dobler as defendants in the action, and discharging it from liability upon the payment to the chamberlain of the city of New York of the amount claimed in the complaint, "and for the appointment of a guardian *ad litem* for such of the said parties so sought to be substituted as are infants."

This motion was made upon an affidavit of the "grand recorder" of the defendant, whose duties are those of secretary of said corporation, setting forth the pendency of the action; that on or about March 17, 1885, Anton Dobler, deceased, became a member of the defendant, affiliating with a lodge of said order, located in New York city, known as "Our Own" Lodge, number 298, and a beneficiary certificate was thereupon issued

to said Anton Dobler which certified that he was "entitled to all rights and privileges in the Ancient Order of United Workmen, and to participate in the beneficiary fund of the order to the amount of $2000, which sum at his death shall be paid to Babette A. Dobler, wife;" that on or about March 28, 1890, said Anton Dobler directed the payment of the beneficiary fund to which he might be entitled at his death to Charles Dobler, bearing the relationship to himself of son, and a new certificate bearing date April 1, 1890, was thereupon issued to him, providing for said payment to said Charles Dobler; that thereafter, on June 15, 1891, said Anton Dobler revoked the direction last mentioned and directed the payment of the beneficiary fund due at his death to Frank Joseph Anton and Tillie Dobler, bearing the relationship to himself of son and wife, share and share alike, and thereupon the certificate described in the complaint was issued to him; that Babette A. Dobler, representing herself to be the wife of said Anton Dobler, claims the beneficiary fund due upon the death of said Anton Dobler, and claims to be incorrectly described in said certificate as Tillie Dobler instead of Babette A. Dobler; that she has demanded payment of said fund; that there is no collusion between her and the defendant, and the defendant is not acquainted with the merits of the respective claims set up by Babette A. Dobler and Tillie Feldman. The defendant also used in support of the motion an affidavit made by its attorney, setting forth that the children of Anton Dobler, deceased, and Babette A. Dobler are Charles Dobler, Anton Dobler, Albert Dobler, all of full age; Tillie Maehlein, wife of Henry Maehlein, Herman Dobler, Elizabeth Dobler, over the age of fourteen years, and William Dobler, under the age of fourteen years; that said Babette A. Dobler and said children claim that in case the certificate last issued to Anton Dobler is set aside they will be entitled to the fund in suit under a provision of the rules and regula-

tions of the defendant; that the said claim is made without collusion, and the defendant does not know to which of said parties the beneficiary fund due on the death of Anton Dobler, deceased, can safely be paid.

Guardians *ad litem* were not appointed for the infants whom it is asked in the notice of motion to be made parties, but the notice of motion is directed to them, and it is recited in the order made upon the hearing of the motion that John Hardy appeared as attorney for them, and the notice of appeal served by plaintiffs' attorney is addressed to Mr. Hardy, as such attorney for said parties. It does not appear from the printed papers on appeal that any notice of motion was ever served upon said infants.

J. George Flammer, for plaintiffs, appellants.

Leroy Andrus, for defendant, respondent.

O'BRIEN, J.—This action was commenced to recover the sum of $2000 under a beneficiary certificate issued by the defendant on the life of one Anton Dobler.

The plaintiffs' right to recover is based upon the fact that they are the ones designated as the beneficiaries in the policy. The defendant, while admitting its liability, seeks to have substituted as defendants, in its place and stead, by an order of interpleader, the wife and minor children of Dobler. Upon the defendant's own affidavits as to the extent of the claim advanced adversely to plaintiffs, it is extremely doubtful, to say the least, if any such state of facts is presented showing a right to an order of interpleader. The rule is now settled that there must be some reasonable foundation for a claim asserted to entitle a defendant, while admitting its liability, to have such claimants substituted by order of interpleader. In other words, the question upon a motion of this character is as to whether or not there is a reason-

able doubt as to the safety of the stakeholder in paying over the money. As stated by Mr. Justice VAN BRUNT, in Nassau Bank *v.* Yandes (44 *Hun*, 55), such reasonable doubt must be supported by proof raising a question upon which the court may pass judicially, and the claim must have some foundation in law.

Assuming, however, that it were in other respects a proper case for an order of interpleader, we think upon other grounds, apparent upon the record, the order should not be granted.

Section 820 of the Code of Civil Procedure provides, in terms, that a defendant may apply to the court, upon notice to the plaintiff and to the person making the claim, for an order of substitution or interpleader.

Here the defendant's affidavits and notice of motion show that the application is to the court for an order that Babette Anna Dobler, Charles Dobler, Anton Dobler, Albert Dobler, Tillie Maehlein, Herman Dobler, Elizabeth Dobler and William Dobler be interpleaded in the action. Of these persons four are infants, upon whom service of the notice of motion was not made. The order appealed from, however, without such notice having been given, required the substitution, in addition to Babette Anna Dobler, of all the children, including these infants. In view of the express provision in section 820 of the Code requiring notice, this could not be done. This provision is most reasonable and should be observed, for otherwise persons without notice might be injected into a lawsuit without desiring it, and against the protest of the plaintiff.

Another omission in the order, as shown by Mr. Justice INGRAHAM, was the failure to provide for payment into court, in addition to the principal, the interest on that sum. The order appealed from requires that the entire principal should be deposited into court, although, in respect to the claim of one of the plaintiffs, Frank Joseph Anton Dobler, who claims one half, no adverse

claim is suggested, and in the absence thereof it would seemingly have been the proper thing to have directed the payment of one half of the amount to him, though the court might have been of opinion that as to the balance it should have been deposited.

For these reasons we are of opinion that the order appealed from should be reversed, with $10 costs and disbursements.

VAN BRUNT, P.J. (concurring).—I dissent from opinion of INGRAHAM, J. (*post*). I am of the opinion that parties should not be brought in without notice to them.

INGRAHAM, J. (dissenting).—By the certificate issued to Anton Dobler, the sum of $2000 was payable upon his death to Babette A. Dobler, his wife. Subsequently, Anton Dobler revoked the direction under which this certificate was issued, and directed the payment of the beneficiary fund to be made to Charles Dobler, his son. Subsequently, Anton Dobler revoked the last direction and directed the payment of the fund to be made to Frank Joseph Anton Dobler and Tillie Dobler, his son and wife, share and share alike. It also appeared that Tillie Dobler was not the lawful wife of Anton Dobler, and that Babette A. Dobler, as the wife of Anton Dobler, claims the fund and has demanded payment thereof. There is no intimation that there is any collusion between the defendant and the claimants of this fund, and we think that a proper case is made out for an interpleader and that the claimants be substituted as defendants in this action upon payment into court of the amount claimed. The complaint, however, demands judgment for the sum of $2000, with interest thereon from December 28, 1891, and the order provides that the defendant pay to the chamberlain of the city of New York, to the credit of this action, the sum of $2000 within ten days from the entry of the order. Before

the defendant can be discharged from liability it must pay into court the amount claimed by the plaintiff, and the order must, therefore, be modified so that the defendant pay into court, in addition to the sum of $2000, interest thereon from the 28th of December, 1891, to the date of payment.

The objection is also made that as some of the alleged claimants are infants and were not represented by guardian, and no notice of the application was shown to have been served upon them, the order would not be binding upon them. But it does not appear that any of the infants have any claim to this fund.

All that appears is that the widow of Anton Dobler has made some claim that in a certain contingency her children would be entitled to a portion of the fund.

Notice was given to Babette A. Dobler, the person who claimed the fund, and she having appeared on the motion and consenting to the order, the court had power to substitute her as the defendant in the action upon the payment into court of the amount claimed in the complaint, and on such a motion the court also had power to join as a party defendant any person who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party defendant for the complete determination or settlement of the question involved therein (*Code Civ. Pro.*, § 427).

The plaintiff cannot be injured by the failure of the defendant to give notice to the infants and having a guardian *ad litem* appointed for them, as in case the defendants fail to answer the amended complaint they will be entitled to the fund.

I think, therefore, that the order appealed from should be modified by substituting for the sum to be paid into court the sum of $2000 and interest thereon from December 28, 1891, to the date of the payment, and that upon such payment being made the summons and complaint in this action be amended by inserting

the individuals substituted as defendants in place of the present defendant, and that the plaintiff be allowed to make and serve an amended summons and complaint accordingly, and as thus modified the order should be affirmed, without costs to either party.

McSHANE, Judgment Creditor, *v.* PINKHAM, Judgment Debtor.

City Court of New York, Special Term; June, 1892.

§ 2447.

Proceedings supplementary to execution—when money deposited in lieu of bail cannot be reached.

Money deposited with the city chamberlain in lieu of bail to secure the release from imprisonment of one arrested upon indictment for a criminal offense, who had not and never had any interest in the money, cannot be applied to the payment of a judgment recovered against him in an independent civil action; it does not become his by such deposit,* and an order should not be granted in proceedings supplementary to execution directing the city chamberlain to pay a part of the money to the sheriff to be applied to the satisfaction of such judgment.

Eagan *v.* Stevens (39 *Hun*, 811), Gilbert *v.* Laidlaw (102 *N. Y.* 588) distinguished.

(*Decided June*, 1892.)

Motion by the judgment creditor for an order directing the chamberlain of the city and county of New York to pay to the sheriff of the city and county of New York a part of certain moneys on deposit with him.

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* See Fraser *v.* Ward, 6 *N. Y. Civ. Pro.* 11.

The facts are stated in the opinion.

Goodhart & Phillips, for judgment creditors and motion.

Platt & Bowers, for city chamberlain, opposed.

Taylor, Thompson & Kaufman, for the Fourth National Bank and the Central National Bank, opposed.

VAN WYCK, J.—The plaintiff recovered judgment against defendant for $791 in January last, and issued execution, which was returned wholly unsatisfied, whereupon he obtained a third-party order against the city chamberlain of New York, and the examination had thereunder disclosed that "on May 9, 1892, there was paid to the chamberlain in cash, in the case of The People against Charles H. Pinkham, the sum of $6500, in lieu of bail bond for said defendant, pursuant to an order of the general sessions made by Recorder Smyth and dated May 9, 1892," and that the same is still so held by him. Upon the evidence, and this evidence alone, plaintiff, the judgment creditor, now moves, under section 2446 of the Code, for an order directing the chamberlain to pay out of the money so held by him such amount as will satisfy the execution. The recorder's order of May 9 provides that Charles H. Pinkham be admitted to bail in the sum of $6500, with surety in like amount, or instead thereof he may deposit said sum of money with the city chamberlain, and Pinkham, on the same day, in a written stipulation which recited that he "having this day caused to be deposited the sum of $6500," agreed to abide the above order, etc. The deputy chamberlain deposes that the said $6500 was paid into his office by the Fourth National Bank and the Central National Bank, in lieu of a bail bond for that amount to secure the appearance of said Pinkham. It

appears that at the time of the deposit the chamberlain executed and delivered to these two banks acknowledgments, of which the following is a copy:

"Chamberlain's Office, New York, May 9, 1892.

"The People, etc., *v.* Charles H. Pinkham.

"Whereas, heretofore and on the 9th day of May, 1892, an order was made by Recorder Smyth admitting the above-named defendant to bail, on giving an undertaking in the sum of $6500 on an indictment for grand larceny:

"This is to certify that the Fourth National Bank, for the defendant above named, has deposited with the chamberlain of the city of New York, this day, the amount of $5000 on account of the sum mentioned in said order, as security for said defendant's appearance, pursuant to such order, instead of said undertaking of bail, pursuant to section 586 of the Code of Criminal Precedure."

The other bank received a similar receipt. And the defendant Pinkham deposes that he has not, nor has he ever had, any interest in such money, but that the same was so deposited by these two banks.*

The contention of plaintiff's counsel is that, irrespective of this proof, this $6500 became the property of the defendant the moment it was so deposited, and relies upon two causes which he cites, and upon the language of the sections of the Code of Criminal Procedure which provides for such deposits in money in lieu of the bail bond—namely, sections 586, 592, Code of Criminal Procedure. The case of Eagan *v.* Stevens (39 *Hun*, 311) really has no bearing upon the subject, for there the re-

* The statutory provisions relative to the deposit of money in lieu of bail are to be found in the *Code of Crim. Pro.* §§ 586–589. Those regulating the making and disposition of such deposits in civil actions are in *Code of Civ. Pro.* §§ 582–586.

corder of Cohoes, before whom a person was brought upon a criminal charge, admitted him to bail in $200, and instead of giving the requisite bail, he deposited with the recorder $200 in cash in lieu thereof. This deposit was not made with the county treasurer, as provided in section 586, Code of Criminal Procedure, and hence the court held that "the recorder, in accepting the deposit of money instead of taking bail, acted officially, or attempted so to act, without authority of law; hence his action was void in law, and the money remained the property of McClellan, the depositor, in his hands." And this ruling was under the express provision of a statute which provides that "no sheriff or other officer shall take any bond, obligation or security by color of his office in any other case or manner than such as are provided by law, and any such bond, obligation or security taken otherwise than as herein directed shall be void" (3 *R. S., 7th Ed.*, p. 2374, § 59). The recorder of Cohoes was not authorized to take the deposit, but only the county treasurer.

The other authority cited by plaintiff is Gilbert *v.* Laidlaw, City Chamberlain (102 *N. Y.* 588). In that case the deposit was made by a third party, the plaintiff therein, to whom the chamberlain executed and delivered an acknowledgment or receipt exactly similar to those given to the two banks in the case at bar. This deposit was made by Gilbert, the plaintiff, in lieu of a bail bond of $300 for the appearance of one Nye, who a few days thereafter was tried, convicted and sentenced to pay a fine of $250, and the fine was ordered to be paid from the money so deposited. Then Gilbert applied for alternative mandamus, addressed to City Chamberlain Laidlaw, commanding him to return him the $300 or show cause, but the trial judge decided that he was not entitled to the writ of mandamus, and gave judgment against him for costs. Upon appeal, the general term reversed this judgment, and it, in return, was

reversed by the court of appeals, which merely held that the deposit was, for the purposes of the criminal action, to be considered as the money of the defendant, and, although it was in fact furnished by a third person, it may be applied in payment of any fine imposed upon the defendant in the criminal action. This case goes no farther than so ruling, and such ruling was justified by the express language of section 589 of the Code of Criminal Procedure, which is one of the several sections applicable to bail and money deposits in lieu thereof in criminal actions, and reads as follows: "That when money has been deposited, if it remain on deposit and unforfeited at the time of a judgment for the payment of a fine, the county treasurer must, under direction of the court, apply the money in satisfaction thereof."

These conditions then existed in that case, for the defendant in the criminal action had been convicted and a judgment for the payment out of such deposit of a fine of $250 had been awarded against him, and the money still remained on deposit with the county treasurer, the city chamberlain of New York. But that case does not hold, nor has any authority been cited or found which holds, that cash so deposited by a third person in lieu of bail for a defendant in a criminal action becomes the property of such defendant for the purpose of paying and satisfying his obligations in civil actions entirely disconnected from the criminal action and the subject-matter thereof. The establishing of such a rule of liability in reference to these deposits of cash by third persons in lieu of bail for accused persons should not be sanctioned except by express provision of statute, and no such statute law has been brought to the attention of the court either from investigation or by reference of counsel. This motion to direct the city chamberlain to pay over to the sheriff part of the money so deposited with him is denied, with $10 costs, but as counsel for the two banks, the defendant, the city cham-

berlain and the plaintiff each requested that a stay be granted in case of an adverse decision, such stay will be granted, provided an appeal is duly taken and argued at the September general term.

PARRY, RESPONDENT, *v.* THE ERIE TRANSFER COMPANY, APPELLANT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM; JUNE, 1892.

§ 1780.

Jurisdiction of action against foreign corporation—when objection properly taken—when court without jurisdiction.

Where upon the trial of an action it appeared that the plaintiff was a non-resident of this state and the defendant was a foreign corporation, and the defendant at the close of the plaintiff's case protested against further proceedings in the action and asserted that the trial court was without jurisdiction to determine the controversy upon the merits, which objection was overruled, whereupon he moved to dismiss the complaint on that ground, and upon his motion being denied took exceptions to both rulings, —*Held*, That either of these exceptions sufficiently raised the question of jurisdiction.[2]

The courts of this state are divested of all authority to entertain actions brought therein against a foreign corporation by another foreign corporation unless it is sought thereby to recover damages for breach of a contract made within this state, or the action relates to property within this state when the contract was made, or unless said action was brought to recover real property within this state or a chattel replevied therein, or the cause of action shall have arisen within this state and the object of the action is not to affect the title of real property beyond its territorial limits.[3] These restrictions present conditions upon the exist-

ence of which the power of the court to determine the action is dependent, and acts in disregard thereof are without jurisdiction and of no effect.[4]

Robinson v. Ocean Steam Navigation Co. (16 *N. Y. Civ. Pro.* 255) followed.[5]

The effect of the statute (*Code Civ. Pro.* § 1780) limiting the jurisdiction of courts in actions against foreign corporations cannot be impaired nor the authority of trial courts enlarged by the consent of the parties or the omission to object to its jurisdiction, but the objection may be made at any time, and whenever any jurisdictional fact is wanting it becomes the duty of the court to dismiss the action *ex mero motu*.[5]

The residence of a corporation is in contemplation of the law within the bounds of the sovereignty which created it.[7]

A corporation organized under the laws of New Jersey is a foreign corporation within the meaning of the Code of Civil Procedure.[1]

It seems that where there is no evidence as to where a contract was entered into, and it appears that both parties thereto were residents of New Jersey at the time, that would presumptively determine the place of contract as being within that state.[6]

A contract having been made to pay for the use of teams in New Jersey, the presumption is, in the absence tending to show that a different place was agreed upon for the place of payment, that said payment must be made within the state.[8]

A cause of action arises when that is done which ought not to be done, or that not done which ought to have been done, and in the predication of the right to institute and maintain an action this act of commission or omission is the essential and determining fact.[10] As regards a contract, a cause of action is the breach in the fulfillment of the obligations which it imposes, and until the accruing of the action by the breach no cause of action was in existence, and therefore the place where the contract was to be performed is the place where the cause of action arose.[10]

Where, in an action brought by a resident of the state of New Jersey against a corporation organized under the laws of New Jersey upon a contract for the hire of teams inferentially and by presumption of law entered into in the state of New Jersey, the place at which the payment was to be made was not shown, but it appeared that the teams had been used in the state of New York, —*Held*, that presumptively the payment was to be made in the state of New Jersey;[8] that the defendant's breach of contract was its failure to pay the sum agreed to be paid for the teams

hired by plaintiff; and as it was not bound to make payment elsewhere than in New Jersey, the breach occurred and the cause of action arose in that state,[11] and the fact that the teams were used in this state was immaterial;[9] that upon these facts the court was without jurisdiction of action, but that as the plaintiff might be able to cure the jurisdictional defects by further evidence, a new trial should be accorded him.[12]

(*Decided June*, 1892.)

Appeal by the defendant from a judgment of the general term of the city court of New York affirming a judgment entered upon a verdict rendered at trial term, by direction of the court, in the plaintiff's favor.

This action was brought by the plaintiff to recover from the defendant rent agreed to be paid by the defendant to the plaintiff for the use of certain teams hired by the defendant from the plaintiff and employed by it in the transportation of goods between the city of New York and Jersey City.

Other facts appear in the opinion.

Andrew Kent, for defendant, appellant.

George W. Wickersham, for plaintiff, respondent.

BISCHOFF, J.—The question presented to us on this appeal is one affecting the validity of the judgment appealed from for want of authority in the court below to render it.

Defendant is a corporation organized under the laws of New Jersey, hence a foreign corporation within the meaning of the Code (*Code Civ. Pro.* § 3343, subd. [1] 18). Plaintiff, at the time of instituting this action, was and continued to be a resident of the same state. These facts having conclusively appeared upon the close of plaintiff's direct evidence, defendant protested against further procedure in the action, and asserted that the trial court was without jurisdic-

tion to determine the controversy in suit upon the merits. A motion to dismiss the complaint was
[3] denied, and upon failure of defendant to challenge the facts appearing in support of plaintiff's claim, the court directed a verdict in favor of the latter.

To each of these rulings defendant duly excepted, and either exception sufficiently raises the question of jurisdiction.

Pursuant to the provisions of the Code of Civil Procedure (§ 1780), the courts of this state are divested of all authority to entertain actions brought therein
[3] against a foreign corporation by a non-resident or another foreign corporation, unless it is sought thereby to recover damages for breach of a contract made within this state, or the action relates to property within this state when the contract was made, or unless such actions are brought to recover real property within this state, or a chattel replevied therein, or the cause of action shall have arisen within this state, and the object of the action is not to affect the title to real property beyond its territorial limits.

These restrictions present conditions upon the existence of which the power of the court to determine the action is dependent, and acts in disregard thereof
[4] are without jurisdiction and of no effect (Davidsburgh *v.* The Knickerbocker Life Ins. Co., 90 *N. Y.* 526).

The particular restrictions to be considered on this appeal have been determined to have such effect in Robinson *v.* Oceanic Steam Navigation Co. (16 *N. Y.*
[5] *Civ. Pro.* 255), and the court of appeals also sanctions the contention of appellant's counsel that this effect cannot be impaired, or the authority of the trial court enlarged, by consent of the parties or the omission to object to its jurisdiction by answer or demurrer, but that the objection may be made at any time, and that whenever any jurisdictional fact is wanting it becomes

the duty of the court to dismiss the action *ex mero motu*.

It appears inferentially from the evidence that the contract for the hire of teams by plaintiff to defendant was made in New Jersey, but, were all evi-
[6] dence concerning the place where the contract was entered into wanting, the fact that both parties were residents of New Jersey at the time would presumptively determine the place as being within that state. Plaintiff was concededly a resident of New Jersey, and defendant's residence is in contem-
[7] plation of law within the bounds of the sovereignty which created it (Plimpton *v.* Bigelow, 93 *N. Y.* 592).

Defendants having contractually assumed the obligation to pay for the use of the teams in New Jersey, the presumption is, in the absence of evidence tend-
[8] ing to show that a different place was agreed upon for the purpose of payment, that such payment was to be made in the same state (*Wharton on Contracts*, vol. 2, sec. 372; *Lawson's Rights, Remedies and Practice*, vol. 5, p. 4142; Smith *v.* Smith, 25 *Wendell*, 405; Hale *v.* Patton, 60 *N. Y.* 233). It is important to bear these facts in mind in determining where plaintiff's cause of action arose.

Apparently appreciating the force of defendant's objection to the jurisdiction of the trial court, plaintiff's counsel sought to overcome its fatality to the
[9] maintenance of the action by recalling plaintiff and eliciting from him the further fact that the teams were largely employed by defendant in the carriage of goods within the territorial limits of the state of New York, and he thereupon urged with some degree of confidence that the jurisdiction of the court was thus sustained. Recurring, however, to the provisions of section 1780, Code of Civil Procedure, it will be seen that the action was maintainable only provided the contract was made within the state of New York, the contrary of

which, as we have shown, was the fact, or that the cause of action arose therein; hence it was quite immaterial where the teams hired by the defendant were employed by it.

A cause of action arises "when that is done which ought not to have been done, or that is not done which ought to have been done" (Hibernia National [10] Bank *v.* Lacombe, 84 *N. Y.* 367, 384; Toronto General Trust Co. *v.* Chicago, B. & Q. R. R. Co., 32 *Hun*, 190), and in the predication of the right to institute and maintain an action this act of commission or of omission is the essential and determining fact. No right of action exists without a cause of action, and every cause of action necessarily implies a right of action for its prosecution. Each derives its life from the other and their presence is therefore interdependent. As regards a contract the cause of action is the breach in the fulfillment of the obligation which it imposes, and until the accrument of a right of action by the breach no cause of action is existent. Defendant's breach of contract was its failure to pay the sum agreed to be [11] paid for the teams hired of the plaintiff, and as it was not bound to make payment elsewhere than in New Jersey the breach occurred and the cause of action arose in that state.

For the reasons above mentioned, we are constrained to hold that the facts which appeared upon the trial were insufficient to authorize the trial court to [12] render the judgment appealed from, and it must be reversed; but, as plaintiff may be able to cure the jurisdictional defects by further evidence, a new trial should be accorded him.

Judgment reversed and new trial granted, with costs to abide the event.

DALY, C.J., concurred.

GRISSEN, RESPONDENT, *v.* SOUTHWORTH, APPELLANT.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL TERM; JUNE, 1892.

§ 900.

Commission—when irregularity in executing waived.

Where upon the execution of an oral commission which directed that the testimony of a witness for the defendant be taken by questions and answers, word for word, the plaintiff was represented by her general attorney, who, although he knew that the commissioner was taking a part of the testimony in narrative form, did not object,—*Held*, that such irregularity was waived by such failure to object, and the deposition taken under the commission should not be suppressed because the requirement of the commission that the testimony be taken in questions and answers, word for word, was not complied with.

(*Decided June* 24, 1892.)

Appeal by defendant from an order of the Niagara county special term suppressing the deposition of Mary Lyon, a witness for defendant, taken under a commission issued on the defendant's motion.

The facts are stated in the opinion.

Charles Hickey, for defendant, appellant.

W. H. Ranson, for plaintiff, respondent.

PER CURIAM (DWIGHT, P.J., and MACOMBER and LEWIS, JJ.).—A motion in behalf of the defendant was made and granted for the examination of the witness named at

Ovid, in the state of Michigan, upon oral questions to be administered under the direction of Byron V. Soule, a counselor at law, as commissioner. Such examination was had, and the testimony of the witness was properly returned by the commissioner, and filed with the county clerk of Niagara county on the 30th day of March, 1892.

On the 13th day of April, 1892, the plaintiff served a notice of motion for the 22d day of that month to suppress such commission, upon the ground that the testimony of the witness was not taken by question and answer, word for word, as is permitted by section 900 of the Code of Civil Procedure, and as was directed by the commission itself. This section of the Code directs, among other things, that the commissioner must "take down, or cause to be taken down," etc., "the substance of the witness's testimony, unless he is directed, in the commission or the order, or required by the person appearing for either party, to insert in the deposition any or all of the questions or answers, word for word." The direction in this instance, as contained in the commission, was that the testimony of this witness be taken by question and answer, word for word. In respect to a considerable portion of the testimony of the witness, this direction was not observed; and consequently this motion to suppress the commission, being made within a reasonable time after the same was filed with the clerk, was properly granted, unless the irregularity was waived by the parties.

It appears that, at the taking of the deposition, the plaintiff and defendant were respectively represented by counsel, who conducted the examination. The counsel for the plaintiff is shown to have been employed not only for this special occasion, but that he was her general counsel, regularly employed. He, with knowledge of the manner in which the commissioner wrote the testimony, made no objection thereto, and hence, presumably, the commissioner acted with the consent

and concurrence of both parties. We are accordingly of the opinion that the omission to object to the course pursued by the commissioner was a waiver of the direction contained in the commission. In the absence of such direction or request made at the taking of the deposition, the usual course to be pursued by the commissioner, contemplated by the statute, was to take the testimony in a narrative form. A failure to take it by question and answer, word for word, is an irregularity only, and may be waived by the parties by proceeding before the officer in a different manner than that provided by the commission.

It follows that the order appealed from should be reversed, and the motion denied, with costs.

GLOBE YARN MILLS, RESPONDENT, *v.* BILBROUGH *et al.*, APPELLANTS. (Three Actions.)

CITY COURT OF NEW YORK, GENERAL TERM; MAY, 1892.

§§ 315, 1779.

City court of New York—Jurisdiction of action brought by foreign corporation against domestic corporation.

The city court of New York has jurisdiction of an action brought by a foreign corporation against a domestic corporation upon drafts payable within this state, notwithstanding the defendant has not an office in the city of New York.

The rights of the parties to an action upon drafts drawn by the defendant to the order of the plaintiff are governed by the law of the place of payment.

A draft drawn in Cohoes, N. Y., upon a firm legally resident in New York city or doing business there is payable there, and by draw-

ing it the makers undertake that the drawee in New York city will be found at the place where he is described to be, and will there pay it to the payee or order, and that if the drawee does not pay it, the makers will make such payment at that place, and upon being notified of non-payment by the drawee, the makers become absolutely bound to pay the amount at the place named.

Where the affidavit upon which an attachment was granted was made by one who acted for the treasurer of the corporate plaintiff and who conducted the negotiations and completed the transactions with the defendant, and the facts were within his personal knowledge, and the affidavit so far as it was upon information and belief stated the source thereof,—*Held*, that it was sufficient.

(*Decided May* 25, 1892.)

Appeals by defendant from orders of the special term denying motions to vacate attachments.

The material facts are stated in the opinion.

Kneeland, Stewart & Epstein, for defendant, appellant.

Eaton & Lewis, for plaintiff, respondent.

McCarthy, J.—This is an appeal on the part of defendants from an order denying a motion to vacate a warrant of attachment. The motion was made on the papers on which the attachment was granted.

Actions I and II are on drafts made by the defendants in Cohoes, N. Y., to the order of the treasurer of the plaintiffs, drawn on Gowing, Sawyer & Co., No. 63 Leonard Street, New York city.

It was conceded that the same was presented thereafter for acceptance and same refused, and that notice of such non-acceptance was given to the defendants and the drafts are unpaid, and action III was on a draft made in Cohoes, N. Y., and payable at Troy, N. Y.

The plaintiff is a foreign corporation, organized and existing under the laws of the state of Massachusetts,

and the defendants are a domestic corporation and doing business at Cohoes, in the state of New York.

The appellant contends that this court has no jurisdiction, because neither the plaintiff nor the defendant resides in nor has a place of business within the city of New York, and that the cause of action did not arise within the city of New York. It is claimed by respondents, and not denied by appellants, that summons and complaint were properly served on defendants in pursuance of section 3170, Code of Civil Procedure.

The cause of action arose within the jurisdiction of this court. Two of the drafts, although made in Cohoes, were addressed to a firm in New York city. The third was payable at the city of Troy, within the state of New York. The rights of the parties are to be governed by the laws of the place of payment. Both places are within the state, and therefore this court has jurisdiction.

The principal contract sued on, although made in Cohoes, N. Y., was addressed to a firm legally resident in New York city, or doing business there, and the draft was consequently payable there, and upon general principles the jurisdiction of the court may be invoked in ascertaining its nature and interpretations and the duties and liabilities which it created. By drawing the draft, the defendants undertook that the drawees in New York city would pay it to the plaintiffs or their order, that is, to any person to whom it should be indorsed; and that if the drawees did not so pay it, they, the defendants, would make such payments (Everett *v.* Vendryes, 19 *N. Y.* 438; Hibernia Nat. Bank *v.* Lacombe, 84 *N. Y.* 367).

The drawer of a draft undertakes that the drawee will be found at the place where he is described to be, and that the sum specified will there be paid to the holder when the draft is presented, and if not so paid, and he is notified, he becomes absolutely bound to pay the amount at the place named (see 84 *N. Y.* 379).

Admitting that plaintiff is a foreign corporation, sec-

tion 1779, Code of Civil Procedure, reads: "An action may be maintained by a foreign corporation in the manner and subject to the same regulations as where the action is brought by a domestic corporation, except otherwise specially prescribed by law." . . . Section 3343, subdivision 18, Code of Civil Procedure, among other things, defines "a domestic corporation to be a corporation created by or under the laws of the state." . . . Section 315, Code of Civil Procedure, reads: "The jurisdiction of the city court of New York extends to the following cases: An action against a natural person or against a foreign or domestic corporation, wherein the complaint demands judgment for a sum of money only, or to recover one or more chattels, with or without damages for the taking or detention thereof."

There are no provisions of the Code of Civil Procedure which declare that in order that this court shall obtain jurisdiction over a plaintiff, a domestic corporation, the same must have a place of business in the city, nor does it fix any other limitations in order to entitle plaintiff to bring suit in this court.

And since section 1779 of the Code of Civil Procedure gives a foreign corporation the right to sue in the same manner and subject to the same limitations as a domestic corporation, it follows that the plaintiff in this action is properly in court. In other words, this court has the same jurisdiction on this subject as the supreme court. The only provisions in regard to domestic corporations are section 264, which applies to superior city courts, and section 341, which applies to a county court. Section 3169, Code of Civil Procedure, has been fully complied with.

From an examination of the various sections quoted, it is very clear that this court has jurisdiction of the person or corporation as well as the subject-matter of the action.

We think there is nothing in the objection to the suffi-

ciency of the affidavits upon which the attachment was granted. The person who made the affidavits was the one who acted for the treasurer of the plaintiffs and conducted the negotiations and completed the transactions with the defendants. He was not in the position of an attorney, but that of a principal.

The facts were certainly within his personal knowledge, and under the authorities we think the affidavits were sufficient.

Besides, wherever any statement was made on information and belief, the source of such information is fully and fairly stated.

The orders appealed from should be affirmed, with costs.

McGown, P.J., concurred.

KEMP *v.* UNION GAS AND OIL STOVE COMPANY.

City Court of New York, Special Term; June, 1892.

§§ 3228, 3229.

Costs—when defendant entitled to because plaintiff recovers less than $50 and action is within jurisdiction of district court.

When in an action to recover $374 on contract the answer was a general denial and a counterclaim of $700, and the plaintiff proved and was found entitled to recover only $41.14 of his claim and the defendant did not prove any part of his counterclaim,—*Held*, that the defendant and not the plaintiff was entitled to the costs of the action; that the fact that the accounts claimed by both parties exceeded $400 did not make the case

one of which a district court would not have jurisdiction and in which the plaintiff on recovering less than $50 would be entitled to costs, since the accounts proved to the satisfaction of the referee before whom the action was tried did not exceed $400.

Sherry v. Cary (111 *N. Y.* 514) distinguished.

(*Decided June*, 1892.)

Motion by both parties to this action for an extra allowance under section 3253 of the Code of Civil Procedure.

The facts are stated in the opinion.

Sidney J. Cowen, for plaintiff.

Hatch & Warren, for defendant.

VAN WYCK, J.—The alleged cause of action was a money demand on contract for $374, and the answer was a general denial and an alleged counterclaim for $700. The referee finds, as matter of fact, that plaintiff has only proved $41.14 of his claim, and that defendant has not proved any part of his counterclaim, and as conclusion of law that plaintiff is entitled to recover of defendant such sum of $41.14. See referee's report filed June 21, 1892. It is conceded that the party entitled to costs should be granted an extra allowance, and the referee so certifies, and both parties now move for such allowance. The plaintiff's recovery being for less than $50, he is not entitled to costs (Code, § 3228), and the defendant is (§ 3229), unless this action belongs to a class of which courts of justices of the peace have not jurisdiction. Section 2863 of the Code, subdivision 4, specifies as one of such class: "Where, in a matter of account, the sum total of the accounts of both parties. proved to the satisfaction of the justice, exceeds $400." Whether such was the fact in this case must be deter-

mined by the facts found by the referee, as his finding is conclusive upon the parties for this purpose (Fuller *v.* Conde, 47 *N. Y.* 89). And it is incumbent on the plaintiff to show that a justice's court had not jurisdiction of the case. That is not done by proof that the sum total of the accounts *claimed* by both parties exceeded $400, for section 2863 of the Code has made the jurisdiction dependent upon the sum total of such accounts *proved*, to the satisfaction of the justice, which means, in this case, to the satisfaction of the referee, who, however, finds that plaintiff has proved only $41.14 of his claim, and that defendant has failed to prove any part of his counterclaim, and hence it appears that the sum total of the accounts of both parties, as proved to the satisfaction of the referee, amount to only the sum of $41.14. The plaintiff's recovery was not reduced to this amount by reason of any allowance of defendant's counterclaim, or any part thereof, for the same was disallowed *in toto* by the referee. The plaintiff's account, as proved, was only $41.14, and the defendant's was nothing. It follows that the sum total of the accounts of both did not exceed $400, and hence that a justice's court had jurisdiction of the action, and, as plaintiff's recovery was less than $50, that the defendant is entitled to costs (Tomkins *v.* Greene, 21 *Hun*, 257, affirmed in 82 *N. Y.* 619, on the opinion of the court below). The counsel for plaintiff relies on the case of Sherry *v.* Cary (111 *N. Y.* 514) as an authority in support of his contention that plaintiff is entitled to costs, and hence should be granted an extra allowance; but in that case there was the specific finding that plaintiff had proved his claim of $657.85 and defendant his counterclaim for $634.26, and that plaintiff, therefore, was entitled to recover the balance of $23.59. Hence in that case the sum total of the accounts of both parties as *proved* certainly exceeded $400, for plaintiff's recovery was reduced to $23.59 by reason of the allowance of

defendant's counterclaim, as proved, of $634.26, and so that case was not within the jurisdiction of a justice's court, and the plaintiff was entitled to costs, although his recovery was for less than $50. But it is different in this case, for, as already stated, the sum total of the accounts of both parties, as found by the referee, amounted to only $41.14, and the case was, therefore, within the jurisdiction of a justice's court, and the defendant is entitled to costs.

Defendant's motion for an extra allowance granted, and plaintiff's similar motion is denied.

BROWNING, RESPONDENT, *v.* N. Y., LAKE ERIE & WESTERN R. R. CO., APPELLANT.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL TERM; JUNE, 1892.

§ 3234.

Costs—when both parties to action entitled to.

Where the complaint in an action sets forth separately three causes of action, and a verdict was directed in favor of the defendant upon one of them on the ground that the uncontradicted facts showed that the defendant was not entitled to recover, and the jury found a verdict in favor of the plaintiff on another cause of action,—*Held*, that both plaintiff and the defendant each recovered on a cause of action, and each was entitled to costs.

The word "recovery," as used in § 3234 of the Code of Civil Procedure providing that where "a complaint sets forth two or more causes of action upon which issues of fact are joined, if the plaintiff recovers on one or more of these causes and the

defendant on the other or others, each party is entitled to costs against the adverse party," clearly contemplates a decision upon a question of fact which, if allowed to remain unreversed, is conclusive upon the parties with respect to the issues there presented.

Burns v. Delaware, Lackawanna & Western R. R. Co. (22 *N. Y. Civ. Pro.* 48) followed.

(*Decided June*, 1892.)

Appeal by the defendant from an order of the Allegheny county special term denying defendant's motion for a new taxation of costs and for an order directing the adjustment of costs in his favor.

The opinion states the facts.

James H. Stevens, Jr., for defendant, appellant.

V. A. Willard, for plaintiff, respondent.

PER CURIAM (DWIGHT, P.J., MACOMBER and LEWIS, JJ.).—This appeal must be governed by the decision of this court made in the case of Burns *v.* Del., Lack. & Western R. R. Co. (22 *Civ. Pro.* 43), where it was stated, in the opinion of Mr. Justice MACOMBER, that the meaning of the word "recovery," used in this section (§ 3234), clearly contemplates a decision upon a question of fact which, if allowed to remain unreversed, is conclusive upon the parties in respect to the issues there presented.

In the case now before us three causes of action were stated in the complaint, each one of which was controverted in the answer. The first cause of action consisted of the allegation that the defendant so carelessly and negligently managed its locomotives and cars as to set fire to a division fence, owned by the plaintiff, between two of plaintiff's lots of land adjacent to the railroad; that by reason thereof seven head of cattle, of the value of $170, were destroyed, for which a recovery

was sought. The second cause of action was that, at a time stated, two cows of the plaintiff, of the value of $25 each, escaped from the plaintiff's lands, through a defective fence, which it was the duty of the defendant to maintain, and entered upon the lands and railroad of the defendant, and were run over and killed by the defendant's locomotive. The third cause of action is unimportant to the consideration of any question arising upon this appeal.

The learned justice at the trial ruled that he should instruct the jury, which he accordingly did, that upon the first cause of action the jury should render a verdict for the defendant, upon the ground, as appears from the moving affidavits, which are not contradicted, that, by an ancient deed of the lands pertaining to the first cause of action, there was a covenant which ran with the lands, which required the owner of the adjacent property to maintain fences, and for that reason no recovery could be had against this defendant. It will thus be seen that the defendant succeeded, upon a question of fact, against the plaintiff upon the first cause of action. Upon the second cause of action the jury rendered a verdict for the value of the two cows, namely, $50, and interest from the time of the killing.

Under these circumstances, inasmuch as the causes of action were separately stated and issues of fact were taken upon each of them, and a decision in favor of the defendant upon the first cause of action and in favor of the plaintiff upon the second cause of action was rendered, all the provisions or correlative bills of costs, contained in the section above mentioned, must be applied; for in regard to each of such causes of action there was a decision, by a proper tribunal, of a question of fact, which, as long as it remained unreversed, was conclusive upon the parties to this action. It is clear, therefore, that the plaintiff had a "recovery" upon the second cause of action, and it is equally clear that the defend-

ant had a "recovery" upon the first cause of action. This, it seems to us, is the precise case contemplated by this provision of the Code; and it follows that the order appealed from should be reversed, and the bill of costs of the defendant, arising upon the first cause of action, should be taxed in defendant's favor.

Order appealed from reversed, with $10 costs and disbursements, and the defendant's motion granted, with $10 costs.

READ, APPELLANT, *v.* SIMON, RESPONDENT.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL TERM; JUNE, 1892.

§§ 1500, 1522, 1523.

Ejectment—severance where one of two plaintiffs dies pendente lite.

Where pending an action of ejectment brought by a brother and sister as tenants in common, the sister died leaving a will devising her share of the land to her husband, and the validity of the will was contested and undetermined, and it appeared that if it was not sustained the brother would inherit his sister's share of the property,—*Held*, that a severance of the action was properly directed, but that as the provisions of the Code of Civil Procedure with respect to this subject were confused, and their application doubtful and uncertain, leave was properly granted the surviving plaintiff to amend his complaint or serve a supplemental complaint.

(*Decided June*, 1892.)

Appeal by the plaintiff, John J. P. Read, from an

order of the Erie county special term, directing that this action be severed, and that it continue as between said plaintiff, John J. P. Read, and the defendant, and that said plaintiff have leave to amend his complaint or serve a supplemental complaint.

The facts are stated in the opinion.

O. O. Cottle, for plaintiff, respondent.

George W. Cothran, for defendant, appellant.

MACOMBER, J.—This action was brought by the plaintiff, John J. P. Read, and his sister, Elizabeth A. S. Read, the latter now deceased, to recover possession of the land described in the complaint, under allegations showing that such plaintiffs were tenants in common thereof, and that the defendant was wrongfully in possession thereof, and refused to surrender the same to them.

After the case was begun, Elizabeth A. S. Read intermarried with one George W. Rockwell, and at her death left a last will, by the terms of which all of her estate, both real and personal, was devised and bequeathed to her husband. She died without issue. A contest arose respecting the validity of the will, and a trial of the issues therein has been twice had before a jury, resulting, in each instance, in a disagreement. It is obvious, therefore, that, if this will is ultimately sustained, the plaintiff can recover but an undivided half of the lands; while, if it is overthrown, he, as the only heir of his sister, would inherit her share, and thus be entitled to a recovery of the whole of the premises.

As is shown by the learned counsel for the respondent in his brief, prior to the case of Hasbrouck *v.* Bunce (62 *N. Y.* 475), no doubt could be entertained but that a case like this could have proceeded, as between the

surviving plaintiff and the defendant, without any order of severance. The revisers, in preparing section 1500 of the Code of Civil Procedure, which permits one or more part owners to maintain ejectment, show that such section was introduced for the purpose of annulling the decision above cited, so that the law would be deemed restored as it previously was supposed to exist. The codifiers, however, inserted sections 1522 and 1523, and those sections seem to confuse the rules of practice, and make the application of the several provisions of the Code doubtful and uncertain;* but, on the whole, we

* Section 1500 of the Code of Civil Procedure is as follows: "Where two or more persons are entitled to the possession of real property, as joint tenants or tenants in common, one or more of them may maintain such an action, to recover his or their undivided shares in the property, in any case where such an action might be maintained by all."

Mr. Throop, in a note to this section published in his edition of the Code, says: "This section, which is new in form, is designed to settle the conflict between Cole *v.* Irvine (6 *Hill.* 634), on the one hand, and Jackson *v.* Bradt (2 *Caines*, 169), and Kellogg *v.* Kellogg (6 *Barb.* 116), on the other; in accordance with the presumed intent of the final clause of the amendment made to Co. Proc. § 118, in 1867. But it does not disturb the ruling that two persons claiming under hostile titles cannot unite as plaintiffs in an action against a third person (Hubbell *v.* Lerch, 58 *N. Y.* 237). This section as now framed renders one of the rulings in Hasbrouck *v.* Bunce (62 *N. Y.* 475) hereafter inapplicable."

Section 1521 of the Code of Civil Procedure makes the provisions of the Code of Civil Procedure (§§ 755–761) relative to the abatement and revival of an action applicable to an action of ejectment.

In his note to this section Mr. Throop says: "Substituted for § 32 of the same title of the R. S. and L. 1865, ch. 357, § 1 (6 *Edm.* 477). The latter act was probably passed in consequence of the decision in Mosely *v.* Mosely (11 *Abb. Pr.* 105), to the effect that § 32 of the Revised Statutes was not enlarged by any of the provisions of the Code of Procedure. It was expressly held in that case, that the death of a sole defendant abated the action. But the consolidation in this act of the various statutes relating to the subject will render ch. 8, tit. 4, *ante*, applicable to this as to every

think the learned justice at special term has easily surmounted the difficulty presented by these several sec-

other action, and the provisions of §§ 755–761, *ante*, appear to be applicable without it. They cover every case, except where, upon the death of a party, different persons succeed to different distinct portions of the property sought to be recovered, or where one person succeeds to the rights or liability of the deceased party in the real property, and another to his rights or liability in the rents and profits. These cases are provided for in the next two sections. See Hasbrouck *v.* Bunce (62 *N. Y.* 475)."

Sections 1522 and 1523 read as follows:

§ 1522. "Where, upon the death of a party, different persons succeed to the decedent's title to, or interest in, different distinct parcels of the property sought to be recovered, the court may, upon motion, and upon such terms as justice requires, direct that the action be divided into as many actions as are necessary; and that the successor to the title or interest of the decedent to or in each distinct parcel be substituted as plaintiff or defendant, as the case requires, in the action relating thereto."

§ 1523. "Where the plaintiff seeks to recover damages for withholding the property, and upon the death of a party different persons succeed to the decedent's right to or liability for those damages, and to his title to or interest in the property, the court may upon motion, made upon notice to the persons to be affected, and upon such terms as justice requires, direct the action to be divided into two actions, one to recover the possession of the property, with the rents and profits thereon accruing after the decedent's death; the other to recover the damages accruing before his death; and that the successor in interest of the decedent, with respect to the cause of action in each action, be substituted as plaintiff or defendant therein, as the case requires."

Mr. Throop, in his notes to these sections, says that they are intended to supply a *casus omissus* in the original statute as explained in the note to section 1521. He also says in his note to § 1523: "The original statute makes no provision for the continuance of action, so far as it related to the damages or the rents and profits, where the decedent claimed in fee; and as, in that case, the successor to his interest is not entitled to, or liable for, such damages or rents and profits, it is presumed that the cause of action, so far as it relates thereto, abates. Provision was made in the Revised Statutes for the suggestion of a claim for mesne profits, by the

tions of the Code, by inserting a provision in the order, allowing the plaintiff to amend, or make a supplemental complaint, if he sees fit to do so, as a part of the order of severance. In this way alone, perhaps, the parties may safely proceed to a trial of the case. Therefore it follows that the order appealed from should be affirmed.

Order appealed from affirmed, with $10 costs and disbursements, but with leave to the plaintiff to serve a supplemental complaint within 30 days, on payment of the costs.

DWIGHT, P.J., concurred.

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personal representatives of a plaintiff dying after issue joined (2 *R. S.* 311, part 3, ch. 5, tit. 1, § 54 (3 *R. S.*, *5th Ed.*, 598; 2 *Edm.* 320)."

Doherty *v.* Matsell (9 *N. Y. Civ. Pro.* 103) seems to be the only case decided under these provisions since the enactment of the present Code of Civil Procedure. In that action the grantees of lands held adversely to his grantors at the time of the conveyance to him brought an action to recover said lands in the names of his grantors, and two of them died pending the action, and the defendant moved at the trial to dismiss the complaint on the ground that it had not been revived in the name of the executors of such deceased plaintiffs, which motion was denied and an exception taken, and the court at the close of the case directed a verdict for the defendant and ordered the exceptions of the plaintiff to be heard in the first instance at general term,—*Held*, that an order granted after such trial, reviving and continuing the action in the name of the executors of the deceased plaintiffs, and permitting the plaintiffs to amend the proceeding and "to amend and supplement their complaint showing the death of said plaintiffs and the qualifications of their legal representatives so as to conform to the proofs taken on the trial *nunc pro tunc*" as of the day before the trial, was improperly granted; that the remedy for the defect was not to be found in sections 755 to 761 of the Code of Civil Procedure, which provide for reviving and continuing actions in certain cases, but was analogous to that which may be applied after an answer of a defect of parties, viz., to amend the complaint and proceed *de novo*, and that it would not be correct to allow such an amendment *nunc pro tunc*.

MARKS *et al.*, APPELLANTS, *v.* LA SOCIÉTÉ ANONYME DE L'UNION DES PAPETERIES, RESPONDENT.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM; JUNE, 1892.

§ 432.

Service of summons—when party coming within the state to testify as witness not exempt from.

Witnesses are entitled to immunity from the service of civil process for the commencement of actions while attending our courts for the purpose of testifying either on the trial of the action in the court or *de bene esse* before a referee or notary, and this exemption extends not only to witnesses, but also to parties to the action, and applies where the witness is a director of a foreign corporation, and the action in which he is sought to be served is one against said corporation.

Where one coming into this state from a foreign country for the purpose of testifying on the trial of an action, found upon his arrival that the action had already been tried, and then instead of securing the prompt taking of his testimony *de bene esse*, entered into negotiations extending over nearly a month, which ended in the making of a stipulation under which his deposition was taken, and then after the taking of his deposition remained within the state for about one week to attend to his private business,—*Held*, that service of a summons made upon a foreign corporation of which he was the president, by delivering the same to him three weeks after he arrived in this state, and before the making of the stipulation under which his deposition *de bene esse* was taken, should not be set aside on the ground that he was within the state for the purpose of testifying as a witness; that he lost his right to exemption from service of process by remaining in the state an unreasonable and unnecessary length of time. (PRIOR, J., concurring in result,—*Held*,

that the rule exempting a person coming here to testify as a witness from service of process did not apply where the service was made upon said person not as an individual, but upon a foreign corporation of which he was an officer, by delivering it to him.)

Sheehan *v.* Bradford, Bordell & Kinzua R. R. Co. (15 *N. Y. Civ. Pro.* 429) followed by BOOKSTAVER, J., and not followed by PRIOR, J.

(*Decided June* 6, 1892.)

Appeal by the plaintiffs from an order of the special term setting aside the service of a summons made upon the defendant in this action by delivering it to its president.

The facts are stated in the opinion.

David Tim, for plaintiffs, appellants.

Coudert Bros., for defendants, respondents.

BOOKSTAVER, J.—Witnesses are entitled to immunity from the service of civil process for the commencement of actions, while attending our courts for the purpose of testifying, and this immunity does not depend on statutory provision, but is deemed necessary for the due administration of justice, and extends not only to witnesses, but also to the parties to the action (Matthews *v.* Tufts, 87 *N. Y.* 570). It also applies where the witness is a director of a foreign corporation, and is served with the summons in an action against such corporation (Sheehan *v.* Bradford, Bordell & Kinzua R. R. Co., 15 *N. Y. Civ. Pro.* 429); and it makes no difference whether the testimony is taken on the trial of the action in a court, or *de bene esse* before a referee or notary (Hollender *v.* Hall, 18 *N. Y. Civ. Pro.* 394; affd. 19 *Id.* 293). The only question to be determined, therefore, on this appeal, is whether Engelbert de Limburg-Stirum, who was a director and president of the defendant society, was act-

ually in this country as a witness at the time of the service of the summons upon him, and for no other purpose; for if he were voluntarily within the state upon private business other than attending trial as a party to a litigation, or appearing as a witness in the courts of this state in other judicial proceedings, he could not claim exemption (Sander *v.* Harris, 20 *N. Y. Civ. Pro.* 258). It appears that two actions were commenced in the supreme court by the defendant herein against the plaintiffs,—one an action in replevin and the other for an accounting. The replevin action had been reached upon the calendar before the 16th January, 1892, and was set down for a day certain. The accounting action had not then appeared upon the day calendar, and no trial of it was imminent. On the day last named the defendant's attorney sent a cable message to Brussels, requesting Limburg-Stirum to come to America as soon as possible, with letters, etc. Presumably this cable was for the purpose of having him here as a witness in the first action. In obedience thereto, he left Brussels on the 26th January, but did not arrive here until the 6th February. On his arrival he was informed that the replevin action had been tried, and a verdict rendered in favor of the defendants therein and against his company; consequently he was no longer needed as a witness on that trial; and the taking of his testimony *de bene esse*, after verdict, was merely precautionary, in view of a possible new trial of that action, or in order to have the deposition for use in the action for accounting. Consequently, under such circumstances, it was his duty to have such examination taken with as little delay as possible, and for this purpose he could at once have applied to the court for an order for his examination, which would have been made returnable within a few days; but from the papers it appears that, instead of doing this, negotiations were entered into between the counsel for the respective parties looking to such examination *de*

bene esse, with the result that a stipulation for the taking of the deposition was entered into on the 2d March, and the testimony taken on the 4th of that month. Meanwhile the witness was transacting business with several persons and firms in this city and vicinity, and plaintiffs' counsel, having learned of this fact, served him with the summons in question on the 27th February, before the giving of the stipulation. It also appears from the papers that when the stipulation was given, or about that time, it was stated to plaintiffs' counsel that the witness intended to sail for Europe on the 5th March, and had engaged passage for that date, but he did not actually sail until the 12th of that month. On this state of facts we do not think the service of the summons should have been set aside, for it is apparent, notwithstanding the affidavit of the witness, that he unnecessarily delayed the taking of his deposition, and attended to business matters while here, and that the object of his stay was at least in part for business purposes. Hence he lost his privilege by remaining in the state an unreasonable and unnecessary length of time (Finch *v.* Galligher, 25 *Abb. N. C.* 404; Van Lieuw *v.* Johnson, referred to in Person *v.* Grier, 66 *N. Y.* 126). Besides this, the witness remained in this state a week after the deposition was actually taken, although plaintiffs' counsel was informed that he was to sail on the following day; *non constat* but, had plaintiffs known of this intended delay, they would have served a new summons upon him. We therefore think the order should be reversed, with costs.

BISCHOFF, J., concurred.

PRYOR, J. (concurring in result).—I concur in the decision, but upon the ground that the case is neither within the letter nor the spirit of the law according immunity to witnesses from service of process. The pro-

cess was not served upon the witness, but on the defendant corporation, of which the witness was president and director. "Personal service of a summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof to the president," etc. (Code, § 432). Thus it is the corporation that is served, and not the president to whom the copy summons is delivered. The policy of the law is not to repel foreign witnesses from our jurisdiction by apprehension of personal consequences; but, by the delivery of the summons against the corporation to the president, he incurred no personal peril or embarrassment. Indeed, the interests of justice are promoted, rather than obstructed, by upholding this service, instead of sending the citizen to a foreign country for redress of his grievance. Sheehan *v.* Bradford, Bordell & Kinzua R. R. Co. (15 *N. Y. Civ. Pro.* 429) is a special term decision, and, I think, is unsupported by reason or authority.

PENNIMAN, RESPONDENT, *v.* FULLER & WARREN CO., APPELLANT.

COURT OF APPEALS; JUNE, 1892.

§ 984.

Place of trial—when demand for change of, may be served with amended answer.

Where in an action in the supreme court the proper county is not named as the place of trial and the defendant answers without demanding a change of the place of trial, and thereafter serves an amended answer and with it a demand for a change of the place of trial, a motion subsequently made by him that the place of trial be changed to the proper county should not be denied merely because no demand therefor was served with the original answer.

Penniman *v.* Fuller & Warren Co.

An amended answer properly served supersedes all the defendant's former pleadings in the case.
Vieder *v.* Baker (83 *N. Y.* 156) followed.
Penniman *v.* Fuller & Warren Co. (62 *Hun*, 473) reversed.
(*Decided June* 7, 1892.)

Appeal by the defendant from a judgment of the general term of the supreme court in the first department affirming an order denying a motion to change the place of trial.

The facts are stated in the opinion.

Albert Smith, for defendant, appellant.

Charles E. Mahony, for plaintiff, respondent.

MAYNARD, J.—The place of trial of this action was not laid in the proper county. The plaintiff was a resident of Kings and the defendant of Rensselaer county. The summons and complaint both state that the trial is desired in New York county. With an amended answer the defendant demanded that the trial be had in the county of Rensselaer, naming it as the proper county. The demand was not complied with, and the defendant then moved to change the place of trial to Rensselaer, which was denied, upon the ground that the demand was not served in time; that it should have been served before the original answer was served, or at the time of serving it.

In so holding we think the court below erred. The defendant had a right to serve an amended answer, as of course, and when so served it became the answer in the action and superseded all his former pleadings (Seneca Co. Bk. *v.* Garlinghouse, 4 *How.* 174; Fry *v.* Bennett, 3 *Bosw.* 200; Dann *v.* Baker, 12 *How.* 521; Sands *v.* Calkins, 30 *Id.* 1; Elizabethport Manfg. Co. *v.* Campbell, 13 *Abb. Pr.* 86; Figg *v.* Edwards, 20 *Hun*, 90.)

It was not an amendment of the original answer. It was a new pleading. The defendant had an absolute right to interpose it, and the service, with it, of a demand to change the place of trial would seem to be a substantial compliance with the requirement of the Code. The mode of procedure to be observed, as a condition precedent to the exercise by the defendant of his right to have the place of trial changed, evidently had in view the date of joining issue by the service of the answer in the usual and orderly manner of pleading, as the limit of time beyond which a demand would be ineffectual. So long as the defendant has within his control the shaping of the issues upon which the trial of the action is to be had, he may avail himself of the privilege of the statute and elect whether he will go to trial in the county where the venue is laid, or compel his adversary to transfer the cause to the proper county to be selected by him. We agree with the general term that the demand should be made at, or before, the time of joining issue; but where an amended answer is served in due season, that time is fixed by such service. Until then the issues are transitory and not definitely known or determined. It might be that upon the issues framed by the original answer it would be a matter of indifference to the defendant in what county the action should be tried; but with the service of an amended answer an entirely new case might be presented for trial, which he might deem important to have tried in the proper county.

The case of Veeder *v.* Baker (83 *N. Y.* 156) is authority for the position that the service of an answer does not necessarily limit the time in which a demand may be made, if another answer is served under the provisions of the Code authorizing the service of pleadings as of course. There the defendant had, with his original answer, served a demand and made a motion to change the place of trial, which had been denied. The plaintiff

served an amended complaint, to which the defendant interposed an answer and made another demand and a second motion to change the place of trial, in accordance with it, which was granted.

The just rule would seem to be that the defendant may retain the right to insist that the trial shall be had in the proper county until he has, by his own act, defined the issues to be tried, when the right is gone, unless he has put the plaintiff in default by the service of the prescribed demand. While it will not be presumed that the defendant intends to serve an amended answer, yet the right exists, and, if availed of, it becomes the answer of the defendant in the action; and it would be contrary to the liberal rule of construction, which the Code requires to be adopted in applying its provisions, to deprive him of a privilege which it is expressly stated may be exercised at the time of the service "of the answer."

The plaintiff cannot be seriously prejudiced. If the amended answer has been served for the purpose of delay it may be stricken out on motion, and with it would fall whatever incidents and privileges the defendant would otherwise have derived from it. Section 984 of the Code provides that an action of this character must be tried in the county in which one of the parties resided at the commencement thereof. The plaintiff has deliberately disregarded this requirement. It is true that a subsequent section permits the action to be tried in the wrong county, unless the defendant makes the demand and follows it with a motion, if not promptly complied with: but a technical construction should not be invoked to aid the plaintiff in his effort to avoid the application of the statute.

The orders of the general and special terms should be reversed, with costs, and the motion to change the place of trial granted, with costs.

All concurred.

In re ACCOUNTING OF JAMES NEALE PLUMB AS GUARDIAN OF THE PERSON AND ESTATE OF MARIE JEANETTE PLUMB.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; MAY, 1892.

§§ 887, 888, 2538.

Commission—may issue out of surrogate's court.

A commission may issue out of a surrogate's court for the taking of the testimony of a witness who is without the state, for use in a proceeding in said court. Although the provisions of the Code relative to the issuance of commissions do not in general apply to special proceedings, they are made applicable to said proceedings in surrogates' courts by section 2538 of the Code of Civil Procedure.

An order of a surrogate directing the issuance of a commission to take the testimony of a witness without the state will not be reversed upon appeal, where the facts alleged in the moving papers would sustain the order notwithstanding they are in substantial respects contradicted by answering affidavits; in such a case the matter is to a great extent within the discretion of the court, and the conclusion reached by it will not be disturbed except in cases where it can be seen that the discretion has been illegally or arbitrarily exercised in favor of granting or denying the application.

(*Decided May* 13, 1892.)

Appeal by James Neale Plumb, guardian of the person and estate of Marie Jeanette Plumb, from an order of the surrogate's court in New York county directing the issuance of a commission to take the deposition of a witness without the state.

The facts appear in the opinion.

Henry Thompson (*Vanderpool, Cumming & Goodwin*, attorneys), for James Neale Plumb, guardian, etc., appellant.

David McClure (*Turner, McClure & Rolston*, attorneys), for Marie Jeanette Plumb, respondent.

O'BRIEN, J.—The appellant claims that, upon the law and upon the facts used as the basis of the application for a commission, the order made by the surrogate should not have been granted. In determining whether the facts upon the application would justify the granting of the order, we think the true test to apply would be to consider what, in the absence of any opposing affidavits by the appellant, would have been the duty of the surrogate. Applying this test, we think there was sufficient to justify the order. The presentation of the opposing affidavits, while we may concede that they destroyed the force and effect of all, or nearly all, the statements contained in the affidavits used to support the application for a commission, left the subject in a position where it became necessary for the surrogate to determine as to the credibility and weight to be attached to the conflicting affidavits, and upon motions of this character, where the judgment of the court below is to be exercised, and the matter to a great extent is within its discretion, the conclusion reached will not be disturbed, except in cases where it can be seen that the discretion has been illegally or arbitrarily exercised in favor of granting or denying the application. With this rule in mind, we have examined the papers presented, and do not feel that we would be justified in reversing the conclusion reached by the surrogate upon conflicting affidavits.

The serious and important question, however, raised by this appeal relates to the question of whether under

the law the surrogate has any power to issue a commission at all. The effect of a decision, as contended for by appellant, would be to deprive the surrogate of all power in any proceeding pending before him to issue a commission, and in view of the serious results that would follow from such a conclusion it should not be adopted unless the law demands it. There can be no question but that, prior to the repeal in 1880 (Laws 1880, ch. 245, § 1), the surrogate had power to issue a commission; such power having been expressly conferred by chapter 460, Laws 1837, § 77. Since the repeal of the act of 1837 by the general repeal of the act of 1880 the subject of granting commissions is regulated by the Code of Civil Procedure.

The provisions of the Code applicable to the present discussion are to be found in sections 887 and 888, which latter section states in what cases a commission may be issued.

Appellant insists, and in this insistence is supported by authority, that this section 888 is applicable only to actions, and has no application to special proceedings.* This concession, however, while it applies to the supreme court and other courts of record, would be equally applicable to the surrogate's court, were it not that by another section of the Code (section 2538) the provisions of section 888 have been extended to apply to the surro-

* A commission cannot issue in a special proceeding. So held in proceeding to disbar attorney (Matter of an Attorney, 83 *N. Y.* 164); in proceedings supplementary to execution (Graham *v.* Colburn, 6 *Duer*, 678; s. c., 14 *How. Pr.* 52; Morrell *v.* Hay, 15 *Abb. Pr.* 430; s. c., 24 *How. Pr.* 48); in proceedings under acts relating to absconding debtors (Matter of Whitney, 4 *Hill.* 533); in reference under special statute (Wood *v.* Howard Ins. Co., 18 *Wend.* 648).

A commission cannot issue to secure deposition for use on motion (Huelin *v.* Ridner, 6 *Abb. Pr.* 19; Stake *v.* Andre, 9 *Id.* 420; s. c., 18 *How. Pr.* 159; Hodgskin *v.* Atlantic & Pac. R. R. Co., 3 *Daly*, 70; affg. s. c., 5 *Abb. Pr., N. S.*, 73).

gate's court. By this section it is provided that "certain provisions, which include section 888, shall be applicable to proceedings in the surrogate's court, and the proceedings therein, so far as they can be applied to the substance and subject-matter of a proceeding, without regard to its form."

When we recall the fact that all forms of procedure in the surrogate's court are special proceedings, and not actions, section 2538, so far as making applicable the provisions of section 887 and 888, in regard to taking depositions without the state on a commission, would be meaningless, as applied to the surrogate's court, were we to hold that it was only in an action in the surrogate's court that the surrogate would have the power to issue a commission. Such a construction would be to hold, in effect, that, though the legislature intended to confer the power upon the surrogate's court, such power could not be exercised, because no action could be brought in the surrogate's court, and the provisions relating to the taking of depositions are confined to actions. We do not think that such a construction, rendering meaningless the statute, is warranted by the language used. The legislature, in enacting section 2538, had undoubtedly in view the difference that exists between courts wherein actions may be brought and the surrogate's court, which deals solely with special proceedings; and hence, in making applicable the other provisions of the Code to the surrogate's court, we find that in reference thereto the language used is that such provisions are made applicable "to the proceedings therein so far as they can be applied to the substance and subject-matter of a proceeding, without regard to its form."

While the question of the surrogate's jurisdiction does not seem to have been raised in any of the reported cases, we have many instances where it has been exercised, and where the surrogate has issued a commission, basing his authority upon the general provisions of the

Code (Bristed *v.* Weeks, 5 *Redf.* 529; Cadmus *v.* Oakley, 2 *Dem.* 298; Henry *v.* Henry, 4 *Id.* 253; Bull *v.* Kendrick, *Id.* 330).

The commissions issued in these cases related entirely to will contests, and from this circumstance the appellant seeks to justify a distinction between such a proceeding and other proceedings pending in the surrogate's court. It is true that upon a contest over the probate of a will an issue of fact is raised by the petition and answer, yet the fact remains that it is not an action, but a special proceeding, and like in character to other proceedings over which the surrogate has jurisdiction. In the absence, therefore, of any special provision conferring jurisdiction upon the surrogate to issue a commission in a contested will case, if he has the right, which has been constantly exercised, of issuing a commission in such cases, his power is derived solely from the provisions of the Code already referred to, and, if thereby sustained, would be equal authority for the exercise of such jurisdiction in a case like the present. In other words, there is no distinction between a will contest and a contested accounting before the surrogate, both being special proceedings; and if it were held that a commission could only issue in an action, and it being clear that no action arises in a surrogate's court, the denial of jurisdiction in a case like the present would be equal authority for a denial of such jurisdiction in a contested will case. As we have already seen, however, though the question does not appear to have been raised, such jurisdiction has been exercised, and commissions have been issued, and, as we think, rightly, under the provisions of sections 887 and 888 of the Code, which, by section 2538, so far "as they can be applied to the substance and subject-matter of a proceeding, without regard to its form, were made applicable to surrogates' courts."

We therefore think that the order appealed from should in all respects be affirmed, with costs.

VAN BRUNT, P.J., concurred in result. ANDREWS, J., concurred.

GWALTER, RESPONDENT, *v.* NEW YORK SEAL PLUSH AND TAPESTRY CO., APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; MAY, 1892.

§ 635 *et seq.*

Attachment—when motion to vacate properly denied.

Where upon a motion to vacate an attachment issued against the property of a foreign corporation in an action for goods sold and delivered the defendant showed that the goods were sold upon a credit which had not expired at the time of the commencement of the action, and the plaintiff met this allegation by affidavits charging and tending to prove fraud in the original sale,—*Held*, that the motion should be denied; that if there was fraud in the original sale the plaintiff had the right to a rescission because thereof, and it was not necessary for him to allege or prove it as a part of his cause of action, but he might prove it upon the trial in rebuttal of proof tending to show the giving of the credit.

(*Decided May* 13, 1892.)

Appeal by the defendant from an order of the New York county special term denying a motion to vacate an attachment.

The facts are stated in the opinion.

D. D. Sherman, for defendant, appellant.

J. L. Bishop (*Putney & Bishop*, attorneys), for plaintiff, respondent.

PER CURIAM. (VAN BRUNT, P.J., O'BRIEN and BARRETT, JJ.).—The attachment was properly granted upon an affidavit disclosing a sufficient cause of action for goods sold and delivered, and showing that the defendant is a foreign corporation.

The motion to vacate was based upon affidavits tending to show that the goods were sold upon a credit which had not expired at the time of the commencement of the action. The plaintiff met these affidavits by affidavits charging and tending to prove fraud in the original sale.

It seems to us quite clear that the question of fact thus presented was properly remitted to the trial of the action, and that the court correctly decided that the attachment should not be disturbed. The defendant is in error in supposing that it was necessary for the plaintiff to set forth in his affidavit, or even in his complaint, the credit in question, and to allege, as a basis for rescission, fraud in the original contract of sale.

It is well settled in this state that the plaintiff, under such circumstances, may rescind the credit, and sue at once for the value of the goods, leaving the question of fraud to be determined upon the trial, should the defendant set up the credit in his answer. If the credit be thus set up, the plaintiff, upon the trial, may properly rest upon proof of the sale and delivery of the goods. The defendant may then prove an unexpired credit, and at that stage the plaintiff, by way of rebuttal, may prove the fraud. The affidavits read in opposition to the present motion make out a case of fraud amply sufficient to warrant the presentation of that question to a jury.* It

* See Victor v. Henlein (7 *N. Y. Civ. Pro.* 67) to this effect.

is quite clear that what may thus properly be presented at the trial, and there submitted for the determination of a jury, should not now be ignored, nor should the verdict of the jury thereon be forestalled upon a mere preliminary motion of this character.

The order appealed from should be affirmed, with $10 costs and disbursements.

MEYERS *et al.*, JUDGMENT CREDITORS, APPELLANTS, *v.* HERBERT, JUDGMENT DEBTOR, RESPONDENT.

SUPREME COURT, SECOND DEPARTMENT, GENERAL TERM; MAY, 1892.

§ 2432 *et seq.*

Supplementary proceedings—when abandoned—what use of property is not contempt.

Where the examination of a judgment debtor in proceedings supplementary to execution were concluded on November 2, 1887, and an adjournment taken to November 12, and the proceedings then adjourned to a future date in November, 1887, which was not fixed, and thereafter nothing further was done until April, 1891, when a new order for the examination of the judgment debtor was obtained,—*Held*, that the failure for so long a time to reinstate the hearing or apply for a receiver must be deemed a termination of the proceedings; that the judgment debtor was not guilty of contempt in disposing of jewelry belonging to her where she was destitute and the proceeds thereof were necessary for her support, notwithstanding an injunction contained in the original order made in 1887 for her examination in said proceedings.

(*Decided May* 9, 1892.)

Appeal by the judgment creditor from an order of the Kings county special term denying a motion to punish the judgment debtor for contempt.

The facts appear in the opinion.

M. Clelland Milnor, for judgment creditors, appellants.

Carrington & Emerson, for judgment debtor, respondent.

BARNARD, P.J.—The judgment in this case was obtained in February, 1887. In October, 1887, the defendant was examined under proceedings supplementary to execution. Her examination was completed on the 2d of November, 1887. An adjournment was taken to November 12, 1887, for the examination of witnesses. On that day the judgment creditors (plaintiffs) obtained a further postponement to a future day in November, 1887, which was not fixed. The supplemental order contained the usual injunction against a disposition of her property by the judgment debtor. After the 12th of November, 1887, there was no further hearing under the order of 1887. In April, 1891, the plaintiffs obtained a new order for the examination of the judgment debtor.

It appeared that the debtor had disposed of certain property she had at the examination of 1887, to her mother, for value; the consideration being money advanced by defendant's mother to her to a greater amount than the value of the property sold, being the jewelry of the defendant. The transfer was made April 1, 1891, after the defendant was informed that the plaintiffs claimed that Judge PRATT'S order was still in force, and before the new order was obtained from Judge CULLEN. There was no contempt of Judge PRATT'S order proven. The plaintiffs never applied for a receiver, or for an order for the delivery of the property to the creditor.

Some three and a half years had elapsed since the close of the examination. When informed by the plaintiffs' attorneys that they claimed Judge PRATT's order against assignment of property was still in force, the defendant consulted a lawyer of high character for learning, and was informed that the proceedings were abandoned, and that the injunction order terminated with the abandonment. The defendant had no lawyer to represent her on the examination under Judge PRATT's order. The failure for so long a time to reinstate the hearing or to apply for a receiver must be deemed an abandonment of the proceedings. The property consisted, as we have seen, of the personal ornaments of the defendant. Soon after the examination her husband abandoned her, and she became destitute, and dependent upon her mother. It was not a contempt, under the circumstances, for her to sell her jewelry after the proceedings had been so long dormant.

Order affirmed with costs.

DYKMAN & PRATT, JJ., concurred.

CAMPBELL *v.* ERNEST.

SUPREME COURT, SECOND DEPARTMENT, GENERAL TERM; MAY, 1892.

§ 604.

Injunction—when not granted to restrain disposition of property pending action.

An injunction cannot be granted in an action wherein a money judgment only is sought, to restrain the disposition by the defendant *pendente lite* of property belonging to him. The provision

of the Code of Civil Procedure (§ 604, subs. 1, 2) that where it appears that the defendant, during the pendency of an action, is doing, securing or suffering to be done, or threatens or is about to do or suffer to be done an act in violation of the plaintiff's rights, or where it appears that the defendant, during the pendency of the action, threatens or is about to dispose of property with intent to defraud the plaintiff, an injunction order may be granted to restrain the defendant therefrom, was designed to provide a short and easy method for the procurement of injunctions in actions for equitable relief where the defendant, if unrestrained, would do or suffer some act to be done in violation of the rights of the plaintiff respecting the subject of the action to render the judgment ineffectual and nugatory, and it applies and can be utilized only in an action involving the rights of the party which constitutes the subject of the action in respect to which the plaintiff claims some rights, and seeks some special relief.

An affidavit of a defendant in an action setting forth that he intended to use certain property belonging to him for the support of himself and family, and that he needed it for such support because he was sick and unable to work, is not sufficient ground for granting an injunction order restraining him from disposing of said property during the pendency of an action against him on the ground that he intends to dispose of the property for the purpose of defrauding the plaintiff, where the plaintiff has no special property right therein.

(*Decided May* 9, 1892.)

Appeal by the defendant from an order of the Orange county special term enjoining him from disposing of certain property belonging to him, during the pendency of this action.

The facts appear in the opinion.

Esmond & Ward, for defendant, appellant.

Strahan & McClung, for plaintiff, respondent.

DYKMAN, J.—This is an action upon a judgment ob-

tained by the plaintiff against the defendant in the supreme court on the 7th day of July, 1875, for $142.27.

On the 12th day of September, in the year 1891, Benjamin McClung, one of the attorneys for the plaintiff, presented to one of the justices of this court an affidavit made by himself, in which he recited the procurement of an order to show cause why the plaintiff should not have leave to sue upon the judgment, and the appearance of the defendant in opposition to the injunction which was thus sought to restrain him from any disposition of his property pending the action; the presentation of an affidavit of the defendant at that time, of which a copy was annexed; the prevalence of the application before the justice, who made and signed an order in the action granting permission to the plaintiff to bring this action upon the judgment, and also an injunction restraining the defendant from making any transfer or disposition of his property until the determination of this action; the appeal of the defendant from so much of the order as restrained him from transferring his property, and that such appeal would be argued and disposed of at the general term of the court in Brooklyn on the 14th of that month. He uses the following language: "That deponent believes, after reading the said affidavit of William Ernest, a copy of which is hereto annexed as aforesaid, that, should the plaintiff in said action (the plaintiff herein), not be successful in obtaining the affirmance at said general term of the injunction order referred to in said former action, that the said William Ernest, defendant herein, will, during the pendency of this action, dispose of his property referred to in his said affidavit, with intent to defraud the plaintiff herein, and to render nugatory any proceedings or effort by this plaintiff to obtain payment of his claim in this action."

The annexed affidavit of the defendant, to which reference is made, is as follows:

"SUPREME COURT.

"*John J. Campbell* agt. *William Ernest.*

"COUNTY OF ORANGE, CITY OF NEWBURGH, *ss.:*

"William Ernest, being duly sworn, says: (1) That he is a married man, residing at the city of Newburgh, Orange county, N. Y. (2) That he cannot remember that a summons was ever served upon him in the above entitled action, although he cannot deny the fact on oath at the present time. (3) That he is a sick man, unable at the present time to perform work and engage in business, being afflicted with a serious lung trouble. That deponent's father died on the 9th day of June, 1891, at Newburgh, N. Y., leaving a very small property, in which deponent has a third interest, and in which his wife claims her right of dower. That a partition suit has been brought against deponent to partition or sell said property, and, in deponent's opinion, his interest in the property left by his said father will not exceed from two to three hundred dollars. The real estate left by his father is mortgaged for $1500, and consists of a small house and lot in the city of Newburgh, about 18 feet front and rear by 100 feet deep, and worth not to exceed $2500. (4) That deponent's said interest in his father's estate is all the property he has in the world, and includes everything he has for his support, and to keep him in sickness. That deponent's physician says that he is suffering from consumption. Deponent has a severe and constant cough, great weakness, and has been unable to labor since the middle of February last. (5) That it would be a great hardship and affliction to this deponent if the court should restrain him from the use of his property, or make any order that would prevent him from applying it to his necessities during the pend-

ency of the action which the plaintiff herein asks leave to bring. WILLIAM ERNEST.

"Subscribed and sworn to before me this 13th day of August, 1891.

"F. W. TOMPKINS, Commissioner of Deeds, City of Newburgh."

Upon these affidavits and the pleadings, which are not printed in the appeal papers, but which mean only, as we assume, an ordinary complaint upon a judgment, an order was made requiring the defendant to show cause at a special term of this court at Poughkeepsie, on the 19th day of September, 1891, why an order should not be made and entered enjoining the defendant from removing or disposing of his property, or making any disposition of the same, during the pendency of this action, not exempt by law from execution, or in any manner to interfere therewith until further order in the premises; and the order also contained a temporary stay until the determination of that motion.

Upon the return day of that order to show cause the motion was heard and granted, and an order was made enjoining and restraining the defendant from removing or disposing of his property not exempt from execution, or making any disposition of the same during the pendency of this action, or in any manner interfering therewith until further order in the premises.

The defendant has appealed from the order, and we are required to ascertain whether it can be sustained.

The rule of law by which the validity of the order must be tested is this: "Where it appears by affidavit that the defendant, during the pendency of the action, is doing or procuring or suffering to be done, or threatens or is about to do or procure or suffer to be done, an act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, an injunction order may be granted to re-

strain him therefrom." "Where it appears by affidavit that the defendant, during the pendency of the action, threatens or is about to remove or dispose of his property, with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition" (Code Civil Proc. § 604, subds. 1, 2).

This statute authorizes the interposition of the court, and the issuance of an injunction order, to restrain the action of a defendant, where it appears by affidavit that during the pendency of the action he is doing or procuring or suffering to be done, or threatens or is about to do or procure or suffer to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual; also where it appears by affidavit that the defendant, during the pendency of the action, threatens or is about to remove or dispose of his property with intent to defraud the plaintiff.

It was the design of the law to empower the court to enjoin the commission of some particular act which the defendant was doing or procuring or suffering or threatening in violation of the rights of the plaintiff respecting the subject of the action, or where he was about to remove or dispose of his property with intent to defraud the plaintiff. But it never was intended to authorize the restraint of all sales of property. Moreover, before any act can be restrained it must be violative of the rights of the plaintiff respecting the subject of the action, and we may pause here to say that the property of the defendant is not the subject of this action, and no act of the defendant in relation thereto can violate any rights of the plaintiff respecting the same, for that reason, and for the additional reason that the plaintiff has no rights in such property and claims none. In short, this statute has no application to an action of this character, where a moneyed judgment only is sought. It was designed to provide a short and easy method for

the procurement of injunctions in equitable actions for relief where the defendant, if unrestrained, would do or suffer some act in violation of the rights of the plaintiff respecting the subject of the action, which would tend to render the judgment ineffectual and nugatory. But plainly it applies and can be utilized only in an action involving the rights of the parties to something which constitutes the subject of the action, in respect to which the plaintiff claims some rights, and seeks some special relief. In no proper or legal sense can a defendant do or permit any act in violation of the plaintiff's rights respecting the subject of the action, in an action on contract for the recovery of money only. The plaintiff in such an action has no rights, as against the property of the defendant, until he obtains a judgment, and until then he has no legal right to interfere with the defendant in the use and sale of the same. It would be a new and dangerous innovation to hold that a plaintiff, upon the commencement of an action on an account against a merchant, could procure an order of the court restraining him from selling his goods pending the suit because such sales would diminish the chances for the collection of the judgment when obtained, and yet such is the logical result of the doctrine which would sustain this order.

Turning now to the affidavit upon which the order was based, we find it entirely insufficient to sustain it, in any view. It states no fact, and merely says that, after reading the affidavit of the defendant, the deponent believes he will dispose of the property referred to during the pendency of this action, with intent to defraud the plaintiff, and render nugatory any effort of his to obtain payment of his claim in this action. How he could imbibe such a belief after reading the affidavit it is impossible to conjecture. Certainly there is nothing in the affidavit tending to induce such a conviction. The defendant said there that it would be a great hard-

ship to him if the court should restrain him from the use of his property, or make any order that would prevent him from applying it to his necessities. There is no expression of a desire or intention to sell or dispose of the property, and no statement from which such intention can fairly be inferred. But, even though the affiant did entertain such belief after he read the affidavit, he could not transfer his credulity to the judge who made the order. That official required facts to convince the judicial mind, and upon which he could find that the defendant entertained an intention to make a fraudulent disposition of his property, and it is idle to claim that the affidavit contained any statement to justify such a conclusion, or upon which the judge could base any action.

The order should be reversed, with $10 costs and disbursements.

PRATT, J., concurred.

ATTLEBORO NATIONAL BANK, RESPONDENT, *v.* WENDELL *et al.*, APPELLANTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; MAY, 1892.

§ 1900.

Costs—liability of attorney for where action brought in fictitious name.

An attorney who brings an action in a name of a dissolved and non-existing corporation should be required to pay the costs of the action notwithstanding he has acted in good faith, and has himself been imposed upon by persons asserting that they represent such a corporation.

(*Decided May* 13, 1892.)

Appeal by the defendant from an order of the New York county special term denying a motion that the plaintiff's attorney be required to disclose what bank, if any, is the real plaintiff, and where it is located and does its business, or, if there is no such bank, why the said attorney himself should not satisfy the judgment for costs.

The facts are stated in the opinion.

G. A. Strong (*Martin & Smith*, attorneys), for defendants, appellant.

John J. Adams, for respondent.

PER CURIAM (VAN BRUNT, P.J., O'BRIEN and BARRETT, JJ.).—It is alleged in the moving affidavit, upon information and belief, and not denied by the opposing affidavit, that this action was brought in the name of a bank which went out of existence a number of years before the suit was instituted. Under these circumstances there is no plaintiff in existence from whom the defendants can collect the costs awarded to them, nor was there any such plaintiff in existence when the action was brought. It follows that the attorney who inadvertently brought the suit, and thus subjected the defendants to the litigation which has resulted in this judgment for costs against the plaintiff, should be required to pay such costs.

There is here no question but that the attorney acted in perfect good faith in bringing the suit, and his liability rests upon no fact which affects in the slightest degree his professional position. He was himself practically imposed upon by others who profeesed to represent this non-existent bank. Believing in their authority, and in the existence of the client, he brought the suit which has resulted in this bill of costs. His liability rests upon the fact that as an attorney he has brought

the defendants into court, without authority from any existing principal or client, and has subjected them to the litigation which has resulted in the manner indicated. As the defendants have succeeded in that litigation, it will not do to say that the costs awarded against the non-existent plaintiff shall forever remain unpaid and unsatisfied. If the attorney had required from an existing principal actual authority to bring the suit, he would not have been in the position in which he now stands. Having proceeded without such authority, the reasonable conclusion is that he must satisfy the judgment which the defendants have secured against his assumed principal.

The order should therefore be reversed, and an order made requiring the payment of the judgment for costs, together with the disbursements of this appeal.

DAYTON, RESPONDENT, *v.* McELWEE MANUFACTURING COMPANY (two cases). THE NORTHERN NATIONAL BANK OF BIG RAPIDS, MICHIGAN, AND BAKER, APPELLANTS.

SUPREME COURT, FIRST DEPARTMENT GENERAL TERM; MAY, 1892.

§ 682.

Attachment—what must be shown by junior attaching creditors moving to vacate.

A junior attaching creditor moving to vacate a prior attachment levied upon property of the debtor must, in support of his motion, present papers which affirmatively show that every step in his own procedure was sufficient to confer jurisdiction, and the

presentation by him of a copy of a warrant of attachment and of an affidavit showing what has been done thereunder is not sufficient. The proper practice is for the moving creditor to present the papers upon which his attachment was granted, and prove that such attachment was actually levied upon the property covered by the prior attachment.

Tim *v.* Smith (3 *N. Y. Civ. Pro.* 347; aff'd 98 *N. Y.* 87), followed. (*Decided May* 18, 1892.)

Appeal by the Northern National Bank of Big Rapids, Michigan, and by La Flora S. Baker, junior attaching creditors, from an order of the New York county special term denying motions made to vacate a prior attachment issued against and levied upon the defendant's property.

The material facts appear in the opinion.

Talmage W. Foster, for junior attaching creditors, appellants.

Kneeland, Stewart & Epstein, for plaintiff, respondent.

PER CURIAM (VAN BRUNT, P.J., O'BRIEN and BARRETT, JJ.).—We agree with the special term that there is no substantial distinction between these cases and that of Tim *v.* Smith, 3 *N. Y. Civ. Pro.* 347. In the latter case a copy of the warrant of attachment was not appended to the papers, but the attorney made an affidavit with regard to its existence. Here the attorney has made a similar affidavit, and has in addition furnished a copy of the warrant. But the court held, in the case cited, that the junior attaching creditor was bound, when he moved to vacate the prior attachment, to show that his warrant was granted upon papers sufficient to confer jurisdiction; in other words, that both parties should, on the motion to vacate, occupy the same position with regard to the papers upon which their warrants were respectively granted, and that the attacking party should disclose

his own position as well as that of his adversary. This case of Tim *v.* Smith was affirmed by the court of appeals (93 *N. Y.* 87), and it has since been repeatedly followed. We think that the present motions come within the principle there enunciated. A junior attaching creditor, who seeks to destroy the lien of a prior attachment, because of jurisdictional defects, should come into court upon papers showing that every step in his own procedure was sufficient to confer jurisdiction. He should therefore present the papers upon which his attachment was granted, and prove that such attachment was actually levied upon the property covered by the prior attachment. It is only when these facts are made to appear that he shows himself to be "a person who has acquired a lien upon or interest in the defendant's property," within the meaning of section 682 of the Code of Civil Procedure. What is there meant is, of course, a valid lien, i.e., a lien resulting from the existence of all the necessary jurisdictional facts. Upon both principle and authority, it is reasonable to require the moving party to present such jurisdictional facts as a prerequisite to his attack upon the prior attachment. The plaintiff in the prior attachment should not be called upon to look up the papers upon which the junior attachment was granted, and to present them in opposition to the motion to vacate, for the reason that he makes no affirmative attack upon such junior attachment. He merely defends himself against it, and he should, therefore, have the opportunity of showing its inherent weakness upon the face of his adversary's motion papers.

The order should be affirmed, with costs.

GOULD, APPELLANT, *v.* PATTERSON, RESPONDENT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; APRIL, 1892.

§§ 2863, 2951–2956.

Justice's court—question of title to land when does not deprive of jurisdiction—appeal.

Where in an action in a justice's court the title to land appears from the pleadings to be in question, but the defendant fails to give the undertaking required by section 2954 of the Code of Civil Procedure, the defendant waives all objections to the jurisdiction of the justice, and submits his rights to that tribunal upon the questions in issue raised by the pleadings.

In such a case, where it does not appear from the record on an appeal to the county court from the justice's judgment that a question of title to real property was tried before the justice, the county court upon a new trial therein should not dismiss the complaint merely because the title to land was questioned on such new trial.

(*Decided April* 18, 1892.)

Appeal by plaintiff from a judgment of the county court of Livingston county dismissing his complaint on a new trial therein upon appeal from a justice's judgment in his favor for $20.

The opinion states the facts.

George W. Daggett for plaintiff, appellant.

E. C. Olney, for defendant, respondent.

MACOMBER, J.—This action was trespass, and was

brought in a justice's court, in the county of Livingston, where, upon a trial by jury, a verdict of five dollars was rendered for the plaintiff, and thereupon, under the statute, treble damages were awarded by the court, and judgment for that sum was accordingly entered, together with five dollars costs. The defendant appealed to the county court, but such appeal was subsequently dismissed, and nothing arising upon such appeal appears to be material to any question existing in the record before us. The plaintiff also appealed and asked for a new trial in the county court, which was accordingly had. On such trial in the county court, a jury being waived, the county judge, at the close of the plaintiff's case, dismissed the complaint upon the ground, that under the plaintiff's own showing title to real estate came in question, holding, as we infer, that as, in like circumstances, the justice of the peace had not jurisdiction, so on appeal the county court likewise had no jurisdiction to try that issue under section 2956 of the Code of Civil Procedure.

By reference to the pleadings in the justice's court, it appears that the complaint of the plaintiff alleged that in the month of October, 1889, the defendant wrongfully and unlawfully entered upon the lands of the plaintiff, and did then and there, without the leave of the plaintiff, "who was in possession and the owner of said premises aforesaid," maliciously cut down a large number of trees, etc. The answer was, first, a general denial; and, secondly, an allegation that the land, upon which were the trees which were alleged to have been cut down and removed by the defendant, was owned by the defendant; that he had been in possession of the same for upwards of twenty years.

It will thus be seen, that there was an allegation of title in the plaintiff made by the complaint, and, in the answer, a general denial of such title, and an affirmative allegation that such title belonged to the defendant.

By section 2863 of the Code of Civil Procedure (subd. 2), a justice of the peace cannot take cognizance of a civil action "where the title to real property comes in question, as prescribed in title 3d of this chapter."

By sections 2951 and 2952, which is in title 3d above referred to, the defendant may, either with or without other matter of defence, set forth in his answer facts showing that the title to real property will come in question. The justice must, thereupon, countersign the answer and deliver it to the plaintiff. The defendant must also deliver to the justice a written undertaking, executed by one or more sureties, approved by the justice, to the effect specially prescribed in the statute.

Under section 2954, if these two acts are done, that is, a written answer made containing such facts and undertaking given, the action before the justice becomes discontinued.

By section 2955, "If the undertaking is not delivered to the justice, he has jurisdiction of the action, and must proceed therein; and the defendant is precluded, in his defence, from drawing the title in question."

In the record before us, the defendant failed wholly to avail himself of the provisions of the statutes by which he was enabled, if he saw fit, to oust the justice of jurisdiction and have the cause tried either in the supreme court or the county court. Failing in that, he waived all objections to the jurisdiction of the justice, and submitted his rights to that tribunal upon the question in issue raised by the pleadings, even though facts were alleged in the pleadings showing that title to real estate did, in reality, come in question.

The question of title to the real estate upon which the growing trees were was tendered to the defendant by the complaint. It was so drawn that the defendant could set up his own title in the answer, and, on giving the requisite security, oust the justice of jurisdiction; but failing to give the security, he was precluded at the

trial from drawing the title in question. Such was the provision of the Code of Procedure (Adams *v.* Rivers, 11 *Barb.* 390). So much applies, however, only to the proceedings before the justice.

Upon the trial in the county court, the plaintiff's own testimony showed that title to real estate did come in question, and accordingly the county judge, acting, apparently, under section 2956 of the Code of Civil Procedure, dismissed the case upon the motion of the defendant's counsel. Section 2956 is as follows: "If, however, it appears upon the trial, from the plaintiff's own showing, that the title to real property is in question, and the title is disputed by the defendant, the justice must dismiss the complaint, with costs, and render judgment against the plaintiff accordingly." The learned county judge assumed, as we think erroneously, that he was hearing the same case that had been tried before the justice of the peace. But there is contained in the printed record before us the return made to the county court by the justice of the peace of the proceedings before him, and from such record it does not appear that the title of real property was in question and was disputed in that tribunal at the trial. The return, it is true, does not purport to give all of the testimony taken before the justice, nor does it say that it does not contain all of the testimony. The only inference which we can draw from it is that the trial did proceed before the justice of the peace without the question of title to real estate being raised by the plaintiff on his own showing, as it well might have been, notwithstanding the issue raised by the pleadings. The defendant at the trial might have relied and presumably did rely upon other defences than that of title, for he seems not to have raised any question, except by his pleadings, which would tend to oust the justice of jurisdiction.

What, then, the important question is, was the duty

of the county court in a case like this appealed from the judgment of the justice for a new trial? The county court has jurisdiction to try questions of title to real estate, and could have tried this case had the action originally have been brought in that court. The fallacy of the learned counsel for the defendant in making his application for a nonsuit lay in the assumption, which, as above seen, has no existence in the statutes, that the county court was obliged to dismiss the case if title to real estate appeared upon the trial there just as though it was acting in the place of the court of the justice of the peace. But we think that upon the return of the justice, which does not show that title to real estate came in question on the trial before him, it was incumbent upon the county court to hear such evidence as was offered, and to pass upon it notwithstanding any rights or privileges which were secured to the defendant by the provisions of the Code relating to trials of cases before justices of the peace, but which appear to have been waived by his omission to file an undertaking (Code Civil Procedure, section 2955). Any other conclusion, as it seems to us, would enable a defendant, where the pleadings showed that title to real estate might come in question before a justice of the peace, to reap all the benefits of the provisions of law for removal of cases without incurring the hazards of giving the undertaking.

If this conclusion is correct, the judgment appealed from should be reversed, and a new trial granted.

Judgment appealed from reversed, and a new trial granted in the county court, with costs to abide the event.

DWIGHT, P.J., and LEWIS, J., concurred.

DUFFY, APPELLANT, *v.* DAWSON. EVANS *et al.*, RESPONDENTS, *v.* DAWSON.

CITY COURT OF NEW YORK, GENERAL TERM; JUNE, 1892.

§§ 2432 *et seq.*, 2441.

Supplementary proceedings—moneys paid to sheriff, how applied.

Where moneys have been deposited to secure a certain class of liabilities, and the one who made the deposit draws an order directing the payment of a part thereof to a third person, and it does not appear that the person with whom the money is deposited has accepted said order, the legal title to said moneys does not thereby pass.[1]

Where there is a question of priority between different executions in the hands of a sheriff, the order of priority is usually determined by the court upon motion between the execution creditors, and the court has ample power to direct how the money shall be paid, and where the court makes such a direction the sheriff is bound to apply the same accordingly.[2]

The issuance of an execution against the property does not create a lien on the money deposited by the judgment debtor with a third person to provide for the payment of certain possible liabilities.[3]

The provisions of the Code of Civil Procedure relating to supplementary proceedings furnishes the substitute for a creditor's bill in equity, and the service of an order for examination of a third person in said proceedings gives the judgment creditor the priority of a vigilant creditor and a lien on the assets of the debtor.[4, 5, 6]

Lynch *v.* Johnson (48 *N. Y.* 27) followed.[5]

Where property is delivered to a sheriff pursuant to an order made in a proceeding supplementary to execution, the property is to be treated as if it had been levied upon by virtue of an execution issued by the judgment creditor who instituted said proceedings.[7]

Duffy *v.* Dawson.

Where a judgment creditor instituted proceedings supplementary to execution for the examination of a third person indebted to the judgment debtor, and procured an order for the payment of said indebtedness to the sheriff, which the third person complied with, he acquires a lien on the moneys so paid, and it should be applied upon his execution notwithstanding the sheriff at the time holds an execution previously issued upon a judgment recovered by another person; the lien secured by the commencement of proceedings supplementary to execution followed the funds into the hands of the sheriff.[8]

Bevans *v.* Prince (1 *City Ct. R.* 259) followed.[9]

(*Decided June*, 1892.)

Appeal by the plaintiff in an action first above entitled from so much of an order entered March 17, 1892, in the actions above entitled as denied a motion that the sheriff of the city and county of New York pay over to him the sum of $400 paid to the said sheriff pursuant to an order made in proceedings supplementary to execution.

The facts appear in the opinion.

Johnson & Johnson, for plaintiff Duffy, appellant.

A. Edward Woodruff, for plaintiffs Evans *et al.*, respondents.

McGOWN, J.—A judgment was recovered on February 2, 1892, by the plaintiff Duffy, against the defendant Dawson, in the first above-entitled action, for the sum of $540.84, and an execution upon said judgment was issued on the same day to the sheriff of the city and county of New York. On February 3, 1892, an order was made by Justice McGOWN, for the examination of Henry C. L. Peetsch, as a third party, indebted to the said judgment debtor, under section 2441 of the Code, which examination was made before said last-mentioned justice; whereby it appears that the said Peetsch had in his hands on

the 9th day of January, 1892, the sum of $400, belonging to the defendant Dawson, and placed in his hands on December 16, 1891, by one Thomas Barry, with the consent of the defendant Dawson. Thereafter, and on or about February 23, 1892, an order was made by Justice NEWBURGER, directing the said Peetsch to pay the said sum of $400, moneys belonging to the judgment debtor in his hands, to the sheriff of the city and county of New York, to be applied upon the execution of the plaintiff against the defendant. In pursuance of said order, Peetsch paid said sum of $400 to the sheriff. Evans, the plaintiffs in the second above-entitled action, recovered a judgment on the 29th day of January, 1892, against said defendant Dawson, for the sum of $177.62, and on the same day an execution founded on said judgment was issued to the sheriff. On December 31, 1891, the defendant Dawson, by his order, of that date, requested said Peetsch to pay C. W. Evans & Sons, plaintiffs above named (in the second action), the sum of $125 out of the $400 held by him (said Peetsch), belonging to defendant Dawson. Said order was served upon the said Peetsch, on or about the day of its date, and said Peetsch thereafter acknowledged the receipt. There is no proof that Peetsch accepted said order; and the same not having been accepted by Peetsch, it was not a transfer of the debt or of any part thereof. The right of
[1] Peetsch to the possession of the $400 is not substantially disputed; it was placed in his hands by the defendant Dawson voluntarily.

There is no substantial dispute as to the facts of the indebtedness of Peetsch (the third party) to Dawson, for the sum of $400, and Dawson not having made a legal transfer of the $400 in the hands of Peetsch, was the property of the defendant Dawson at the time Peetsch paid the $400 to the sheriff, under the order of Justice NEWBURGER made on February 23, 1892.

The $400 was, as appears by the examination of

Peetsch, to be held by him, and paid over to the defendant Dawson on the 16th day of January, 1892; provided no liens or claims should be claimed against the store sold by Dawson to Barry. It also appears that plaintiff Duffy gave notice to Barry, at the time of the closing of his purchase, of his claim for $400, "and that was the reason the amount was put in his hands," and that Dawson refused then and there to pay it.

On March 8, 1892, an order was made by Justice NEWBURGER, founded upon the judgment-roll herein, the execution issued thereon, order for examination of Peetsch, the order made thereon by Justice NEWBURGER on February 23, 1892, the affidavit of plaintiff Duffy, verified March 3, 1892, directing the said sheriff, and Evans, the judgment creditors above named, to show cause on March 11, 1892, why an order should not be made directing the said sheriff to apply the sum of $400 paid to him by said Peetsch, to the execution issued on the judgment of the plaintiff Duffy.

On the hearing of the motion an order was made thereon by Justice NEWBURGER, denying the motion as stated in said order, "the court being of the opinion that it has no power to grant such an order as sought for by the plaintiff Duffy," and staying all proceedings on the part of the plaintiffs Evans to compel the sheriff to pay over the sum of $177 out of the $400 now in his hands, pending an appeal to the general term of this court, and to the court of common pleas, should such an appeal be taken. From this order plaintiff Duffy appeals.

Where there is a question of priority between different executions in the hands of the sheriff, the
[*] order of priority is usually determined by the court upon motion between the execution creditors, and the court has ample power to direct how the money shall be paid; and where the court makes such

direction the sheriff is bound to apply the same accordingly.

It does not appear that any levy was actually made by the sheriff under the execution issued in Evans *v.* Dawson, upon any property of the defendant Dawson.

The Code contains no provision for a levy on equitable interests in the hands of a third party, probably for the reason that the judgment creditor has a more summary and effectual remedy, by supplementary proceedings, to examine the party owing the debt to the debtor, and by obtaining an order permitting the third party (Peetsch) to pay over such debt to the sheriff, to be applied on the execution. The plaintiffs Evans failed to pursue this statutory remedy on their judgment, and the plaintiff Duffy pursued his remedy under section 2441 of the Code, and by force of his (Duffy's) proceedings the said sum of $400 reached the sheriff for his benefit. The execution issued on the judgment of Evans, etc., *v.* Dawson, created no lien on this sum while in the hands of Peetsch, and none could be created thereon except under section 2441, which was not put in use by the judgment creditors Evans & Sons (see First Nat. Bank of Chicago *v.* Renitz [General Term, City Court], 24 *State Reporter*, 740).

[3]

Duffy, a vigilant creditor, under the order for the examination of Peetsch (obtained under section 2441 of the Code), discovered property belonging to the defendant Dawson in the hands of Peetsch, and the same was paid over, as hereinbefore stated, by order of Justice NEWBURGER, to the sheriff, to be applied upon his execution, and the sheriff refused to apply the same to the execution of Duffy.

The provisions of the act entitled "Supplementary proceedings," furnish a substitute for the creditor's bill, under the provisions of the old court of chancery, and the service of the order for the examination of a third party should give the judgment

[4]

creditor the priority of a vigilant creditor, and a lien upon the assets of the debtor.

In Lynch *v* Johnson (48 *N. Y.* 27) the question decided arose under the provisions of sections
[5] 292 and 294 of the old Code, which were similar in all respects to sections 2441, 2446, and 2447 of the present Code; and EARL, J., in his opinion at page 32, says: "Proceedings under sections 292 and 294 of the Code are parts of the same scheme for the collection of debts inaugurated by the Code. These sections furnish a simple substitute for the creditor's bill, as formerly used in chancery. The commencement of the creditor's suit in chancery gave the creditor at once a lien upon the equitable assets of the judgment debtor. He was rewarded as a vigilant creditor, the commencement of his suit being regarded as an actual levy upon the equitable assets of the debtor. Under sections
[6] 292 and 284, the service of the order takes the place of the commencement of the suit under the old system, and should give the judgment creditor the priority of a vigilant creditor, and a lien upon the equitable assets of his debtor" (see Barnes *v.* Morgan, 3 *Hun*, 703).

Sections 2447, 2448, and 2449 of the Code provide that, where it shall appear from the testimony in proceedings supplementary to execution that property of the judgment debtor is in the possession or under the control of himself or some other person, the judge may, in his discretion, there being no receiver, make an order directing the judgment debtor or such other per-
[7] son to deliver such property to the sheriff. When so delivered, the property is to be treated as if it had been levied upon by virtue of an execution (Estate of Stewart, 8 *Civ. Pro. R.* 356).

The lien of the plaintiff Duffy was rendered effectual by the order of the justice dated February 23,

[8] 1892, directing the $400 to be applied by the sheriff upon Duffy's execution.

In Bevans *v.* Prince (1 *City Ct. R.* 259), McAdam, J., passed directly upon the question involved herein,

[9] and held that the judgment creditor, who, by his diligence, had procured and served the order for the examination of the third party, had a lien upon the property disclosed, and that such lien followed the funds into the hands of the sheriff (see Pach *v.* Gilbert, 18 N. Y. *Civ. Pro.* 262).

That portion of the order appealed from that denied plaintiff's motion must be reversed, with costs, and the motion made by plaintiff Duffy on the order to show cause granted March 8th, 1892, should be granted, with costs.

McCarthy, J., concurred.

In re Petition of MATTESON for Leave to issue Execution to sell Certain Property of IRA L. GATES, Deceased, to satisfy Judgment against him.

Surrogate's Court, Chautauqua County; March, 1892.

§ 1380.

Execution against estate of decedent—when leave to issue granted.

Where a judgment was recovered in a justice's court against one G. in January, 1878, and docketed in the county clerk's office in July of the same year, and in December, 1884, the judgment debtor died, leaving personal property which was not sufficient

to pay said judgment, and letters of administration were issued in September, 1888, and the administrator accounted and was discharged in January, 1890,—*Held*, that an application for leave to issue execution upon the judgment to satisfy the same made in March, 1892, a few days later than three years and six months after the granting of letters of administration, should be granted; that the lien of the judgement upon the real property is extended under § 1380 of the Code of Civil Procedure, for the period of three years and six months after the issuance of letters of administration upon the estate of its deceased owner.

Platt *v.* Platt (15 *St. Rep.* 217) distinguished.
(*Decided March* 9, 1892.)

Application by James Matteson for leave to issue execution upon a judgment recovered by him against Ira L. Gates, now deceased, to sell certain lands belonging to said decedent to pay the same.

The facts appear in the opinion.

George H. Frost, for judgment creditor and motion.

M. M. Allen and J. G. Record, for Hiram Putnam, mortgagee, opposed.

SHERMAN, S.—Judgment for $184.54 was duly recovered June 25, 1878, in favor of James Matteson against the decedent, Ira L. Gates, before a justice of the peace of Chautauqua county, of which a transcript was duly made by such justice and filed, and judgment duly entered and docketed thereon for $185.29 in the clerk's office of said county on July 3d of same year. No part of the judgment has been paid, or execution issued to collect it, and same thereupon became a lien on the lands of the decedent described in the petition herein. Soon thereafter the said Ira L. Gates gave a mortgage for $1000 on same lands, which was duly recorded, to said Hiram Putnam, which remains unpaid. The dece-

dent, on December 13, 1884, being six years and five months after the judgment was docketed, died intestate, leaving no personal property to pay the judgment or other debts owing by him at his decease. An administrator was duly appointed of his estate on September 13, 1888, who settled the estate as such, and was duly discharged January 4, 1890; the order granting leave herein to issue execution being made March 9, 1892, and execution issued to sell said lands only a few days less than three years and six months after granting the letters of administration.

It was claimed by the learned counsel for the mortgagee on the trial herein, and denied by the petitioner, that the judgment was outlawed. The petitioner claimed that the lien of judgment would not expire until March 13, 1892, being three years and six months after letters of administration were granted. The mortgagee claimed that such lien expired June 13, 1888, being three years and six months from death of intestate, on December 13, 1884. The important question in this case arises on construction to be given to the meaning of the word "thereafter" in the third sentence of section 1380 of the Code,—whether, in the connection used, it means three years and six months after letters of administration were issued, or same length of time after death of decedent. If the latter, the lien had already expired; if the former, it has not.

Such section reads as follows: "Section 1380. After the expiration of one year from the death of a party against whom a final judgment for a sum of money, or directing the payment of a sum of money, is rendered, the judgment may be enforced by execution against any property upon which it is a lien, with like effect as if the judgment debtor was still living. But such an execution shall not be issued unless an order granting leave to issue it is procured from the court from which the execution is to be issued, and a decree to the same effect is

procured from a surrogate's court of this state which has duly granted letters testamentary, or letters of administration, upon the estate of the deceased judgment debtor. Where the lien of the judgment was created as prescribed in section 1251 of this act, neither the order nor the decree can be made until the expiration of three years after letters testamentary or letters of administration have been duly granted upon the estate of the decedent; and for that purpose such a lien, existing at the decedent's death, continues for three years and six months thereafter, notwithstanding the previous expiration of ten years from the filing of the judgment-roll. But where the decedent died intestate, and letters of administration upon his estate have not been granted within three years after his death, by the surrogate's court of the county in which the decedent resided at the time of his death, or if the decedent resided out of th state at the time of his death, and letters testamentary or letters of administration have not been granted within the same time by the surrogate's court of the county in which the property on which the judgment is a lien is situated, such court may grant the decree, where it appears that the decedent did not leave any personal property within the state upon which to administer. In such case the lien of the judgment existing at the decedent's death continues for three years and six months as aforesaid. But this section shall not apply to real estate which shall have been conveyed, or hereafter may be conveyed, by the deceased judgment debtor during his lifetime, if such conveyance was made in fraud of his creditors, or any of them, and any judgment creditor of said deceased, against whose judgment said conveyance shall have been, or may hereafter be, declared fraudulent by the judgment and decree of any court of competent jurisdiction, may enforce his said judgment against such real property, with like effect as if the judgment debtor was living, and it shall not be

necessary to obtain the leave of any court or officer to issue such execution, and the same may be issued at any time to the sheriff of the county where such property is or may be situated. The person issuing such execution, however, shall annex thereto a description of the real estate against which the same is sought to be enforced, as aforesaid, and shall indorse on said execution the words, 'issued under section thirteen hundred and eighty of the Code of Civil Procedure,' whereupon said sheriff shall enforce said execution as therein directed, against the property so described, and not against any other property, either real or personal, and all provisions of law relating to the sale and conveyance of real estate on execution, and the redemption thereof, shall apply thereto."

By the first part of the third sentence of above section the order of the county court or decree of surrogate cannot be made nor execution issued until the expiration of three years after letters testamentary or of administration have been granted; and immediately following, in the same sentence, are these words: "And for that purpose such a lien existing at the decedent's death continues for three years and six months thereafter, notwithstanding the previous expiration of ten years from the filing of the judgment roll." These provisions were undoubtedly made to enable the administrator or executor to make an inventory of the personal property, and ascertain whether the judgment, or any part thereof, could be paid or satisfied from the personal property. And it is quite clear that the words, "existing at the decedent's death," are here used only as qualifying words as to the time such lien must commence, and not otherwise in any way affecting the limitation of the time from three years and six months from granting of letters.

This view is confirmed by the remaining sentences of said section 1380, providing for cases in which, under the circumstances therein named, leave to issue execu-

tion may be granted, where letters have been issued, and limiting the last sentence of such section as follows: "In such case the lien of the judgment existing at the decedent's death continues for three years and six months," as aforesaid. There is no time limited by the Code or practice in which letters of administration may be issued after the decedent's death. If not issued in three years after such death, they may be issued thereafter upon the petition of any creditor, next of kin, or other person interested in the estate contingently or ortherwise. Bearing in mind that no order for leave to issue execution can be made under section 1380 in less than three years after letters testamentary or of administration have been granted, and such leave is obtained by section 1381 of Code, which expressly provides that notice of application for leave to issue execution "must be given to the executor or administrator," suppose the next of kin or creditors neglect to obtain such letters, as in this case, until about the time or after the three years and six months have expired from the death of decedent, instead of same time after letters have issued, the latter time dating from issuing of letters is wisely provided for in the construction of the word "thereafter," as claimed by the petitioner, so as to give reasonable time to examine the condition of the personal estate, and make an inventory absolutely necessary to ascertain the value of the personal property that may be applied in payment of the judgment, or some part thereof, whereas in the former case no such remedy would exist.

If the meaning of the word "thereafter" is as claimed by the mortgagee as used in section 1380, why should the words "as aforesaid" have been used at the close of the last sentence of said section in place of the word "thereafter," so the sentence would read: "In such case the lien of the judgment existing at the decedent's death continued three years and six months thereafter," instead of "as aforesaid," and thereby giving such sen-

tence a meaning as claimed by the mortgagee. The question is new, and I have been unable to find any authority bearing upon it, except the decision of the learned county judge of Chautauqua county, granting an order a few days since in this case upon the same facts as herein, for leave to issue an execution to collect the judgment in question by sale of said land.

I do not think that the case of Platt *v.* Platt, 15 *N. Y. St. Rep.* 217, cited by the counsel for the mortgagee, is in point, as the precise question here involved was not in it.

The following authorities were cited by counsel as bearing upon the questions raised: Townsend *v.* Tolhurst, 10 *N. Y. Supp.* 378, and cases therein cited; Code, §§ 1251, 1377, 1379, 1381, 3017; *In re* Holmes, 13 *N. Y. Supp.* 100; Waltermire *v.* Westover, 14 *N. Y.* 16.

I direct decree for leave to issue execution to sell the land, as prayed for in the petition.

PATTEN, RESPONDENT, *v.* UNITED LIFE AND ACCIDENT INSURANCE CO., APPELLANT.

COURT OF APPEALS; JUNE, 1892.

§ 834.

Privileged communication—what communication to physician is not privileged.

A physician who has attended a decedent may properly testify to the number of times, dates, and hours when he professionally attended the decedent, and as to whether or not the decedent was then sick. Such testimony is not testimony which he has ac-

quired while attending decedent as a patient in a professional capacity.

Where answers to interrogatories contained in a deposition taken under a commission were excluded on the ground that the questions related to information obtained by the witness while he was attending a decedent as such decedent's physician, need not be inserted in a case to entitle the party proposing to read such deposition to a review of the exceptions taken to the exclusion of such testimony.

In an action upon a policy of life insurance where the defence is that the decedent having failed to pay an assessment had in order to secure his reinstatement falsely certified that he was in good health, the defendant may show that the decedent was not in good health at the time he signed the certificate, and the testimony of a physician to the effect that he was professionally attending the decedent at that time, and that the decedent was then sick, is material and competent.

In such a case the fact that a daughter of the decedent examined as a witness by the defendant insurance company, testified that at and prior to the date of the certificate her father was in good health, does not bind the defendant, she being a hostile witness, largely interested in the success of the plaintiff, who was her mother.

(*Decided June 7*, 1892.)

Appeal by the defendant from a judgment of the general term of the supreme court in the first department affirming a judgment entered in favor of the plaintiff upon a verdict directed for her.

The facts are stated in the opinion.

Harry Wilbur, for defendant, appellant.

J. A. Shoudy, for plaintiff, respondent.

EARL, C.J.—This action was brought on a policy of insurance upon the life of James Patten. The defendant is an assessment insurance company, and the policy by its terms was made payable to the plaintiff. It was

provided in the policy that a failure to comply with the rules of the association as to the payment of assessments should render the policy void. Patten had failed to pay an assessment as required by the rules of the association, and for such failure his policy had lapsed and become void prior to the 19th day of April, 1888. On that day, for the purpose of being reinstated as a member of the association, he executed a certificate certifying that he was in good health, and that certificate was sent to and reached the defendant on the 23d day of April, 1888. Patten died on the 16th day of May thereafter; and the sole defence to this action, which is now relied upon, is that the certificate as to his health on the 19th day of April was untrue. To defeat the action, it was incumbent upon the defendant to show that, at the date of the certificate, Patten was not in good health.

Prior to the trial the evidence of Dr. Perrin, of Washington, D. C., was taken, at the instance of the defendant, under a commission issued for that purpose; and upon the trial it attempted to read in evidence the doctor's examination taken under the commission. The court, upon the plaintiff's objection, refused to permit the answers to certain of the interrogatories to be read in evidence, and such refusals are now the defendant's chief cause of complaint. In answer to the 1st, 2d, 3d, and 4th interrogatories, Dr. Perrin stated that he was a physician, and that his place of residence was in Washington; that he knew Patten, and that his acquaintance with him continued until his death, on May 16, 1888. The interrogatories overruled by the court, and the objections made to them, are as follow: "Did you attend Jarvis Patten professionally in his last illness?" "Did you continue in attendance upon Jarvis Patten until his death?" "When were you first applied to in reference to the last illness of Jarvis Patten? Please give the exact date and time,—whether day or night." "Where did you first see Jarvis Patten concerning his last ill-

ness,—at your office or at his residence, or elsewhere?" These interrogatories were objected to by plaintiff's counsel as calling for a conclusion, and as incompetent and irrelevant. The following interrogatories were objected to generally, no ground being stated: "How many times did you attend him professionally intermediate the occasion you first saw him in relation to his health, as you have testified, and the death of Jarvis Patten? Please give the dates and hours of your attendance, as far as you are able." "How many of these attendances were at your office, and how many at the house of Jarvis Patten?" "Please give the dates of such attendances at your office." "Please give the date of such attendances at the house of Jarvis Patten." These interrogatories do not appear to have been objected to under section 834 of the Code, and it was not objected that the doctor was not competent to answer the questions. The defendant certainly had the right to show, if it could, by some witness, that Patten was not in good health at the time he signed the certificate; and, if it could have shown by any witness that at or about that time he was in charge of a physician, it would have gone a great way to show the untruthfulness of the certificate, and to establish its defence. Patten died in less than a month after executing the certificate certifying that he was in good health, and his health during the whole of that time was a pertinent matter of inquiry and investigation, and the defendant had the right to show its condition by the doctor, unless his evidence was objected to and excluded under section 834 of the Code.

But if we assume that the trial judge, in excluding the evidence, had in mind section 834, and intended to exclude it on account of the prohibition therein contained, the rulings were nevertheless erroneous. At the time the rulings were made it did not appear that the information sought to be obtained from the doctor was

acquired by him while attending Patten as a patient, or that the information sought to be obtained from him was necessary in order to enable him to act in his professional capacity. There is nothing in section 834 which prohibited the defendant from showing that Patten was the patient of the doctor, that he attended him as a patient, and that he was sick. Nor is there anything in that section which prohibited the doctor from testifying whether he was called upon to attend Patten professionally before or after the date of the certificate, or to tell how many times he attended him, whether daily or hourly, from the 19th day of April to the 16th day of May. If the defendant had been permitted to read the answers to these pertinent interrogatories, it is possible that it could have proved facts enough for submission to the jury as to the bad health of Patten at the time he made the certificate.

It is no answer to the defendant's claim of error in these rulings that it does not appear what the answers to the interrogatories were. It was not bound to insert in the record answers which it was not permitted to read; and, the interrogatories being competent, we cannot assume that material and relevant answers were not given by the witness in response to them. We are bound to assume that the excluded answers were harmful to the plaintiff, as her counsel would not otherwise have objected to them.

After the trial judge had refused to allow the defendant's counsel to read the answers to the interrogatories specified, plaintiff's counsel read the first cross-interrogatory and the answer thereto, as follows: "State whether or not you are a person duly authorized to practise physic or surgery." And the witness answered: "I am duly authorized to practise physic and surgery." And he read the second cross-interrogatory and the answer thereto, as follows: "If you shall have stated in answer to the fifth direct interrogatory the cause of

death of Jarvis Patten, state now further whether you did not acquire such information in attending said Patten as a patient in a professional capacity, and whether such information was not necessary to enable you to act in that capacity." And the witness answered: "I did acquire such information in attending said Jarvis Patten in a professional capacity, and such information was necessary to enable me to act in such capacity." Defendant's counsel had not read the fifth direct interrogatory, nor the answer thereto, and had given no evidence by the doctor as to the cause of Patten's death, and therefore the second cross-interrogatory and the answer thereto were wholly immaterial. There was no necessity whatever for the plaintiff to show that the doctor acquired his information as to the cause of Patten's death while attending him in a professional capacity, and that such information was necessary to enable him to act in such capacity, as he had not previously given any evidence as to the cause of Patten's death so far as this record discloses. If we should assume that the doctor obtained information of the nature of Patten's sickness while attending him professionally, and that such information was necessary to enable him to act in his professional capacity, such assumption would not justify the exclusion of the evidence called for by the direct interrogatories above specified, because none of them called for the nature of the disease with which he was afflicted.

After the exclusion of the defendant's interrogatories put to the doctor, it called as a witness a daughter of the plaintiff, and attempted to show by her when the illness of her father commenced, and that it existed at the time the certificate was made. It also attempted to show by her when the physician was first called to attend her father, and it was unable to show by her that her father's illness commenced prior to the date of the certificate, or that the doctor had attended him prior to

the 5th day of May. But the defendant was not bound by her evidence. We may assume that she was a hostile witness, largely interested in the success of this action brought by her mother. We may also assume that the defendant was forced to call her because of the exclusion of the evidence taken under the commission, and hence that the exclusion of that evidence was damaging to it. Rules of evidence play an important part in the administration of justice. They should be reasonably and consistently enforced so as to give certainty to the law which protects the rights of parties. We cannot, without doing injustice to the defendant, ignore its exceptions now brought to our attention, and for the errors which they point out the judgment should be reversed, and a new trial granted, costs to abide the event.

All concurred.

POWERS, AS ADMINISTRATRIX, ETC., RESPONDENT, *v.* SAVIN AND ANOTHER, IMPLEADED, ETC., APPELLANTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; JUNE, 1892.

§ 1204.

What claims may be litigated between defendants—evidence—books when not competent.

Under section 1204 of the Code of Civil Procedure providing that judgment may be given for or against one or more defendants, and that it may determine the legitimate rights of the parties on the same side as between themselves, and may grant to a de-

fendant any affirmative relief to which he may be entitled, a defendant cannot tender an independent issue between himself and a co-defendant which is not raised by the complaint.[10, 11] That section of the Code of Civil Procedure was not intended to permit one defendant to litigate a separate and distinct claim which he might have against another co-defendant with respect to a matter with which the plaintiff had no concern and with reference to which no allegation is contained in his complaint.[14]

In an action brought by the owner of certain stock wrongfully pledged by one who had the custody and possession thereof to recover the surplus remaining after the sale of said stock to satisfy the loan, a defendant to whom the pledgor has made an assignment for the benefit of his creditors cannot litigate with the pledgee a claim made by him to the surplus arising on the sale of other stock pledged by his assignor to secure another loan made by the pledgee to him which is entirely independent and in no way connected with the demand of the plaintiff.[1, 12, 13]

Where stock has been pledged by a broker without the consent of its owner to secure a loan, the pledgee cannot hold the stock, or apply a surplus realized upon the sale thereof made to repay the loan, on account of any other indebtedness due to him from the broker as against the owner of the stock.[1, 9]

Where, in an action by an alleged owner of certain stock deposited by him with a broker who without authority had pledged it to secure a loan, brought to recover the surplus arising on the sale of the stock by the pledgee to repay the loan, the plaintiff endeavored to prove title to the stock by an entry in the books of the broker showing the transaction with the pledgee and the initials "H. L. P.," which it was testified were intended to indicate that the stock belonged to the plaintiff, and the bookkeeper who made the entry testified that he did not know from what he made such entry, but that it was either from certain slips or from somebody who called them off to him, and the person who called them off was not produced, and it appeared that at the time the loan was made a memorandum thereof was made by the broker on certain slips which were placed in an envelope and a like memorandum was made on what was known as a "loan envelope," and it did not appear what had become of said slips, or that they were lost, although there was evidence that a search had been made for them and they could not be found, and the envelope on which the memorandum smiliar to that on the slips was made did not contain the letters H. L. P.

which appeared on the entry in the book,—*Held*, that the books were not propperly admitted in evidence.[2-4] (O'BRIEN, J., dissenting.)[15-18]

Mayor v. Second Ave. R. R. Co. (102 *N. Y.* 572) distinguished in prevailing opinion,[3] and followed in dissenting opinion.[16-18]

Entries made in books of a firm by or at the instance of their assignee after they had made an assignment for the benefit of creditors do not bind them, and cannot be admitted in evidence as admissions made by them against their interest ;[5-8] said entries were not made in the ordinary course of business, but by the assignee for the purpose of ascertaining the condition of the estate,[7] and it is no part of the assignee's duty to confess judgment or to make admissions with reference to the liability of his assignors,[8] (O'BRIEN, J., dissenting.)[18-21]

Adams v. Bowerman (109 *N. Y.* 23) distinguished in prevailing opinion,[6] and followed in dissenting opinion.[20]

(*Decided June*, 1892.)

Appeal by the defendant from a judgment entered upon a trial before a referee.

The facts are stated in the opinion.

Thaddeus D. Kenneson and *John Notman* for defendant, appellant.

L. C. Wahner for plaintiffs, respondent.

VAN BRUNT, P.J.—This action was brought by the plaintiff claiming the ownership by her testator of 300 shares of Chicago, Milwaukee & St. Paul stock, which had been pledged, with other securities, by the firm of O. M. Bogart & Co., without right or authority, with the firm of Savin & Vanderhoof, as collateral for a loan of $50,000, which securities were subsequently sold, and judgment is demanded for the surplus realized upon such sale over the amount of said loan.

Mr. Justice O'Brien, in his opinion (*infra*), states the questions presented by the pleadings to be :

First. Had Hollis L. Powers, the plaintiff's testator, title to the stock ?

Second. Did Bogart & Co., without his consent or authority or right, pledge such stock?

Third. Can the firm of Savin & Vanderhoof hold the stock, or apply the surplus realized upon the sale thereof, upon account of any other indebtedness due them from Bogart & Co., as against the plaintiff?

Fourth. Is the defendant Wheeler, upon the facts proven, entitled to judgment for the surplus realized upon the sale of other securities pledged for a second or other loan made by the firm of Bogart & Co.?

We concur in the conclusion arrived at by Mr. Justice O'Brien as to the third and fourth of these questions. In view of the conclusion reached by us
[1] as to the first it is entirely unnecessary to decide the second. And we cannot concur in the conclusion arrived at by him as to the first.

It appears from the evidence that, almost immediately after the pledge of the stock in question, Bogart & Co. made a general assignment for the benefit of creditors to the defendant Wheeler, and the attempt is made to identify the St. Paul & Milwaukee stock, pledged for the benefit of Savin & Vanderhoof, as stock belonging to the plaintiff's testator by entries now appearing upon the loan book of Bogart & Co. And the determination of the question now under discussion depends upon whether such entries were admissible in evidence or not.

It appears that Bogart, Jr., sent the securities which were pledged to Savin & Vanderhoof, and made a memorandum of the loan on a Stock Exchange ticket
[2] called "tickets," which memorandum, he testified, was correct, and at the same time he made a memorandum on the loan envelope of the collaterals therein contained. These memoranda were the only memoranda made of the loan in the first instance. The slips were not produced upon the trial, but evidence was introduced showing that they were made for temporary purposes

only, and that when entries were made therefrom into the books of the firm, no attention was thereafter paid to them. There was no evidence that these particular memoranda had been lost, although there was some to the effect that a search had been made for them, and, in response to a notice to produce, a statement was made by one of the attorneys that a search had been made for them, but they could not be found. It does not appear with certainty what was done with these memoranda; and there is no evidence as to what was put upon the slips. Mr. Bogart's best recollection was that he placed them in an envelope, and that the envelope was with the books, and was left for the cashier, Townsend, to enter in the loan book. Townsend remembers nothing about the original memoranda, although the entries were made by him in the loan book. Such entries were not made contemporaneously, but after the failure of Bogart & Co., and after Townsend had come back from being absent, which he states might have been a week after the failure. Townsend testified that he either copied the memoranda from slips (temporary Stock Exchange slips) or that they were called off to him. And it does not appear that there was any other source from which he could get the entries.

As Mr. Justice O'Brien has shown, the learned referee states that the memorandum of entries on the envelope correspond with the entries in the loan book; and that in this a grave error was committed, because in that part of the entry which is most material to this action there is a fatal discrepancy—the entry on the envelope not containing the initials "H. L. P.," which appear opposite the entry in the loan book in relation to the 300 shares of St. Paul stock, and which it has been held to indicate that the stocks in question were the 300 shares of St. Paul stock belonging to the plaintiff's testator.

The evidence of this entry in the loan book is claimed to be admissible because of the rule laid down

by the court of appeals as to the admission of
[3] account books in The Mayor *v.* Second Ave. Ry. Co. (102 *N. Y.* 572). But a brief examination of that case will show that the condition of the proof was entirely and essentially different from that which appears by the record in the case at bar. The case cited was an action by the Mayor to recover from the Second Avenue Railroad Company for work and labor and materials for which the railroad company was claimed to be liable. The work done and the materials furnished related to the pavement of the streets in and about the rails of the defendant's railroad. In order to prove the time spent in the doing of this work, the plaintiff called as a witness the foreman who had charge of the work, under whom were two gang foremen, each having charge of a separate gang of laborers. The chief foreman kept a time book, in which was entered the name of each man employed. He visited the work twice a day, and while there took on the time book the time of each man, as reported to him by the gang foreman, who did not see the entries; and also that he marked the men's names as he saw them and knew their faces. The gang foremen testified that they correctly reported to the chief foreman the names of the men who worked: and if they did not work full time they reported that fact also. And the main foreman testified that he correctly entered the reports in the time book as reported to him in the usual course of business each day. And it was held that with such evidence the books were admissible, because the gang foremen were testifying of their own knowledge as to the correctness of the reports made by them to the main foreman, and the main foreman testified that in this time book he correctly entered the reports as made to him.

Under such condition of proof the court held the evidence to be admissible, but in the case at bar the evidence was essentially different. In the first place,

there is no evidence as to what Bogart, Jr.,
[4] entered upon the slips, and in view of the fact of the entry upon the loan envelope the presumption would seem to be that the letters "H. L. P." did not appear upon the slip. And, further, the bookkeeper, Townsend, who made these entries, had no recollection as to whether he entered them from the slips or from somebody who called them off to him. Therefore, we do not know that even what was upon the slips was entered in these books. The person who called off these entries is not produced, and there is a very decided link missing which was supplied in the case cited. And in view of the fact that it was claimed that the entries upon the slips and the envelope corresponded, the inference would be that, as the letters "H. L. P." did not appear upon the envelope, they did not appear upon the slip, and Townsend must have got his information somewhere else. How, we do not know, except, perhaps, it may have been from the inspiration of this somebody who made the announcements to Townsend for entry, whether from the slips or not does not appear.

But Mr. Justice O'Brien has come to the conclusion that upon another principle these entries are admissible, viz., that they are declarations found in the books of Bogart & Co. against their interest in respect to the ownership of these 300 shares of stock. And
[5] attention is called to the rule laid down in Greenleaf on Evidence that "there are two classes of admissible entries, between which there is a clear distinction in regard to the principle upon which they are received in evidence; and one of the classes consists of entries made against the interests of the party making them; and these derive their admissibility from this circumstance alone. It is not, therefore, material when they were made. The testimony of the party who made them would be the best evidence of the fact; but if he is dead, the entry of the fact made by him in the ordi-

nary course of business and against his interest is received as secondary evidence in a controversy between third persons." And attention is also called to
[6] the case of Adams *v.* Bowerman (109 *N. Y.* 23), where the entries in a firm's books as to its solvency were admitted for the purpose of proving the insolvency of that firm in an action to which they were parties.

Now, it seems to us that this principle has no application whatever to the case at bar. If Bogart & Co. were suing here, or were the defendants in this action, it is possible that the principle might apply, but
[7] probably not, as the person who made the entries is alive, but in the present case the party making the entry is not only alive, but, upon being called, shows that he knew nothing about the facts to which the entry related. But when we take into consideration the fact that these books were not Bogart & Co.'s books at this time, and that they were being written up that the assignee might ascertain the condition of the estate of which he was the assignee, it is clear that such entries were not made in the ordinary course of business, and that the title of Bogart & Co. to this stock could
[8] not be impeached or impaired thereby. It is no duty of an assignee to confess judgment or to make admissions in reference to the liabilities of his assignors—which would be the result of the admission of an entry of this description.

In the face of the evidence showing the circumstances under which this entry was made, showing that the party who made it had no knowledge whatever of the transaction, showing that a material part of the entry, as far as this case is concerned, seems to have been evolved out of his own imagination, it certainly cannot be the law that upon such an entry the title of property can be disposed of.

We think, therefore, that it was error to admit these

entries in evidence, and because thereof the judgment must be reversed and a new trial ordered before another referee, with costs to appellant to abide the event.

ANDREWS, J., concurred.

O'BRIEN, J. (dissenting in part).—This action was brought by plaintiff, claiming that her testator was the owner of three hundred shares of the stock of the Chicago, Milwaukee & St. Paul Railroad, which, without right or authority, were pledged by the firm of O. M. Bogart & Co., with whom said shares were deposited, with the firm of Savin & Vanderhoof, as collateral, with other securities, for a loan of $50,000, which securities were subsequently sold, and the judgment demanded is the surplus realized by the sale of the pledged property, over the amount advanced by the said pledgees to the pledgors thereof, O. M. Bogart & Co. The latter firm, almost immediately after the pledge of the stock in question, made a general assignment for the benefit of creditors to the defendant Wheeler.

The questions presented by the pleadings were:

First. Had Hollis L. Power, plaintiff's testator, title to the stock?

Second. Did O. M. Bogart & Co., without his consent and authority, or right, pledge such stock?

Third. Can the firm of Savin & Vanderhoof hold the stock, or apply the surplus realized upon the sale thereof upon accouut of any other indebtedness due them from O. M. Bogart & Co., as against the plaintiff?

Fourth. Is the defendant Wheeler, upon the facts proven, entitled to judgment for the surplus realized upon the sale of other securities pledged for a second or other loan made by the said firm of Bogart & Co.?

The evidence, we think, establishes the fact that, if competent proof was presented to prove Powers' title to the stock, the referee was justified in concluding that

the same was pledged by Bogart & Co. without right or authority.

In respect to the right of Savin & Vanderhoof to apply the surplus to any other indebtedness than the specific loan made on the faith of the securities,
[9] this question has been settled by this court upon the former appeal, holding that they were "entitled to reimburse themselves for payments made on the strength thereof, but not to a greater extent." *

The solution of the question as to whether the defendant Wheeler was entitled to a judgment for the surplus realized upon the sale of the securities pledged for the second loan must depend upon whether or not in this action the rights as between the defendants to such surplus can be determined.

Section 1204 of the Code of Civil Procedure provides: "Judgment may be given for or against one or more defendants. It may determine the legitimate
[10] rights of the parties on the same side, as between themselves; and it may grant to a defendant any affirmative relief to which he may be entitled."

In construing this section it has been held that a defendant cannot tender an independent issue
[11] between himself and a co-defendant which is not raised by the complaint (Lansing *v.* Hadsall, 26 *Hun*, 619; Payn *v.* Grant, 23 *Hun*, 134; Hall *v.* Ditson, 5 *Abb. N. C.* 198, 55 *How. Pr. Rep.* 19).

The complaint alleged that Powers had in the custody and possession of Bogart & Co., who
[12] were bankers and brokers engaged in business in this city, three hundred shares of St. Paul stock, and that, without his knowledge and consent, they pledged the said stock, together with other stock of

* For opinion rendered in making the determination on such former appeal, see Powers *v.* Savin, 19 *St. Rep.* 711; s. c., 2 *N. Y. Supp.* 835.

the defendants, to Savin & Vanderhoof, for a call loan of $50,000. It appeared by the evidence that the surplus realized over and above the amount of the loan of $50,000 upon the sale of the collateral was $4300, and it was to reach this sum that the plaintiff brought this action. The evidence, however, showed, as the amended answer of the defendant Wheeler alleged, that there were two separate and distinct loans of $50,000 made by Savin & Vanderhoof to Bogart & Co., upon entirely different securities, and that the stock claimed by Powers was included in the collateral pledged as security for the first loan of $50,000. It appeared that there resulted from the so-called first loan, for which the plaintiff's securities were pledged, a surplus of $4300, and from the second loan the sum of $3518.75; and it is for this latter amount, upon the evidence, that the defendant Wheeler, as assignee, insists that he is entitled to a judgment.

We do not think that the independent claim for which the defendant Wheeler may have a cause
[13] of action against Savin & Vanderhoof, which is entirely independent and in no way connected with the demand of the plaintiff, can be litigated or the rights of the parties determined in this action. The contest between the latter firm and Wheeler, over the surplus on the second loan, has no connection whatever with the contest waged between the plaintiff and the defendants over the surplus on the first loan. The subject-matter in both suits is entirely separate
[14] and distinct, and we do not think that section 1204 was intended to give any such right as to permit one defendant to litigate a separate and distinct claim which he might have against another co-defendant with respect to a matter with which the plaintiff has no concern, and with reference to which no allegation is contained in his complaint.

Another position taken by the defendant Wheeler

has already been disposed of adversely upon the former appeal, namely, that plaintiff's testator would only be entitled to such proportion of the surplus arising out of the loan in which his three hundred shares of St. Paul stock entered as the proceeds of such stock on sale bore to the whole value of all the securities in that particular loan.

This leaves us to briefly consider the first, most important, and, upon the evidence, the most difficult question presented, as to whether the evidence offered to support proof of plaintiff's title to the stock was competent.

The title to such stock may be said to rest mainly, if not entirely, upon entries from the loan book of
[15] O. M. Bogart & Co., which, if competent with the other evidence in the case, would be sufficient to justify the conclusion reached by the referee; but the absence of such entries from the record would necessitate the conclusion that the burden placed upon the plaintiff of proving title had not been sustained. The testimony bearing upon such entries shows in brief that Bogart, Jr., who sent the securities to Savin & Vanderhoof, made memoranda of the loans on a Stock Exchange ticket, called "tickets," which memoranda he testified were correct; that these memoranda on the tickets, or slips, were the only memoranda made of the loans in the first instance. These memoranda were not produced upon the trial, the evidence showing that they were made for temporary purposes only, and that when entries were made therefrom into the books of the firm, no attention was thereafter paid to them. These particular memoranda were not shown, however, to have been lost, although evidence was given that a search was made for them, and in response to the notice to produce, a statement was made by one of the attorneys that a search had been made for them, but they could not be found.

It nowhere appears that these memoranda were handed to the bookkeeper, and that the entries in the books objected to were copied therefrom. Bogart, Jr., stated that he had no present recollection of what he put on the slips; nor does he know whether they came into the possession of Mr. Townsend after he made them, and who it is conceded made the entries in the book. His best recollection was that he placed them in an envelope, and that the envelope was with the books, and that they were so left for the cashier, Townsend, to enter in the loan book. Townsend remembers nothing about the original memoranda, and his testimony shows that the entry by him in the loan book was not made contemporaneously, but was made after the failure of Bogart & Co., and after Townsend had come back from being absent, which he states might have been a week after the failure.

The referee, in stating his reason for the admission of this loan entry in evidence, so far as the facts for its admission were concerned, summarizes them quite correctly: "The testimony seems to me to show that Mr. Bogart made slips of the transaction and that the slips cannot now be produced; that he had charge of the negotiation of the loans, and that slips were made in the usual course of business, and, at the same time, he made a memorandum on the loan envelope of the collaterals therein. The transaction is entered in the loan book of O. M. Bogart & Co., in Mr. Townsend's handwriting, and the loan book is shown to be the loan book of O. M. Bogart & Co., and that the memorandum on the loan envelope, made at the time of the transaction, corresponds with the entry in the loan book in Mr. Townsend's handwriting. Mr. Townsend testifies that he either copied the memorandum from slips (the temporary Stock Exchange slips) or that it was called off to him, and it does not appear that there was any other source from which Mr. Townsend could get the entries.

In other words, there is no evidence to show that there was any other memorandum except Bogart's slips from which Mr. Townsend could have made the entry in the loan book, and the memorandum or entries on the envelope correspond to the entries in the loan book."

It should be remembered, however, in this connection that the correspondence between the memorandum on the loan envelope and the entry in the loan book is not complete.

In the loan-book entry at the left of the "Three Hundred St. Paul" are the initials "H. L. P.," which it was testified were the initials of and stood for Hollis L. Powers, and were set opposite to this entry to indicate that the three hundred St. Paul stock belonged to him; and it is upon this entry that the proof of the title to this stock being in Hollis L. Powers depends. Upon the loan envelope sent to Savin & Vanderhoof the three hundred St. Paul stock is mentioned, but there is nothing thereon to indicate either by the letters "H. L. P.," or by any other initials or mark, to whom such stocks belonged. This evidence the respon-
[16] dent claims is admissible, upon the rule laid down by the court of appeals as to the admission of account books in the case of The Mayor *v.* The Second Ave. RR., in 102 *N. Y.* 572.

A reading of the opinion in that case will show that the court was impressed with the view that it was
[17] extending the rule as to cases in which account books in favor of the party will be admitted; and solely upon the facts in that case appearing, such evidence was held to be competent.

It is unnecessary for us, in view of the conclusion at which we have arrived, to point out the distinction appearing in regard to the facts in that case and the
[18] one at bar, which we think are sufficiently clear and distinct as to justify the view, were it not for another principle which we think applicable to such

evidence, that it should not have been received because incompetent. In other words, had the evidence in this case objected to been entries in favor of Bogart & Co., which was the question presented in The Mayor *v.* The Second Ave. RR. Co. (*supra*), it would have been error to receive such entry. Here, however, the entry is resorted to by the plaintiff and is relied upon as a declaration against Bogart & Co., in respect to the ownership of these three hundred shares of stock; and as whatever rights the defendants can assert were derived from Bogart & Co. alone, they are equally admissible against such defendants.

In Greenleaf on Evidence (Redfield's Ed., page 144) it is said: "There are two classes of admissible entries, between which there is a clear distinction in regard to the principle on which they are received in evi-
[19] dence. The one class consists of entries made against the interest of the party making them; and these derive their admissibility from this circumstance alone. It is, therefore, not material when they were made. The testimony of the party who made them would be the best evidence of the fact; but, if he is dead, the entry of the fact made by him in the ordinary course of his business, and against his interest, is received as secondary evidence in a controversy between third persons."

This distinction between entries in favor of and entries against the person in whose books the entries are made, finds support in the case of Adams *v.* Bowerman (109 *N. Y.* 23), where, in an action against a sheriff for an alleged unlawful taking, the latter justified
[20] under process against the firm from which plaintiffs acquired title, alleging that said firm acquired title by purchase on credit induced upon false representations as to its solvency; and it was held that the books of the firm were proper evidence against plaintiff upon the question of solvency, and knowledge thereof on the

part of the members of the firm, and that the rejection of such evidence was error. This case we regard in principle as applicable to the question here presented.

The title or right of the defendants to these three hundred shares of stock was derived through Bogart & Co., and entries in their account books, if shown [21] to have been made in the regular course of business, even though not contemporaneous, would be admissible, not in their favor, but as against them and those claiming under them.

The suggestion that upon the facts appearing these entries were made after the failure, and when the firm had ceased to do business, we regard as being without force, for the reason that in connection with that fact it appears that subsequent to the failure the bookkeepers of Bogart & Co. were for some days engaged in making up and balancing the same, with a view of determining the status of that firm, and the entries objected to were made in the course of such business.

Where a failure occurs, and matters relating to the business of the failing individual or firm are not entered upon their books, it is customary, in the ordinary course of business, to have such matters and entries relating thereto inserted for the purpose of determining the condition of the firm. We think, therefore, that the referee correctly ruled in admitting such entry.

It is unnecessary for us, in view of the former appeal and the facts appearing upon the two trials, to advert further to the law or facts which control many of the subsidiary questions raised upon this appeal, it being sufficient, after having disposed of the principal questions presented by this appeal, to say that after an examination of the voluminous record, and the other objections made to the affirmance of the judgment, we do not regard any of them as well taken, and our conclusion is that the judgment appealed from should in all respects be affirmed, with costs.

FUCHS, RESPONDENT, *v.* COHN *et al.*, APPELLANTS.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM; JUNE, 1892.

§ 2235.

Forcible entry and detainer—petition.

The statute of forcible entry and detainer, being in derogation of the common law, and authorizing a process by which one may be summarily divested of his rights, is to be strictly construed, and the proceeding rigidly constrained within its prescribed limits.[1]

The petition by which a summary proceeding in case of forcible entry and detainer is commenced must contain a description of the particular title, estate or interest under which the petitioner claims,[2] and it is insufficient where it merely states that the applicant "is the tenant of the premises pursuant to an agreement with the landlord," without stating whether it is a tenancy for years, or from year to year, or from month to month, or at will or at sufferance: this is not a description of the interest of the petitioner, but at most an allegation that he has some interest which entitles him to possession;[3] an allegation of interest is not equivalent to a description of the interest.[3]

Tenant *simpliciter* is one who holds or possesses lands or tenements by a kind of title.[3]

A complainant in summary proceedings for forcible entry and detainer should disclose in his petition the nature of his right to possession, and how and from whom it was acquired;[4] an allegation as to his rights, without facts to sustain it, is a legal conclusion.[4]

A technical objection suffices to defeat summary proceedings to recover the possession of real property where there is alleged to have been a forcible entry and detainer.[5]

Fuchs *v.* Cohn.

In summary proceedings to recover possession of real property which is claimed to have been forcibly entered and detained, a defect in the description of the petitioner's interest in the premises deprives the court of jurisdiction.[5]

(*Decided June* 6, 1892.)

Appeal by the defendant from a judgment of a district court in the city of New York in summary proceedings to recover real property alleged to have been forcibly entered and detained.

The facts are stated in the opinion.

Andrew Blake, for defendants, appellants.

S. Feuchtwanger, for plaintiff, respondent.

PRYOR, J.—Upon an attentive examination of the evidence in this proceeding, the conclusion is irresistible that not the petitioner, but her husband, was the person whose possession was invaded, and that the invasion complained of was not characterized by the violence and terror essential in the legal definition of a forcible entry. The petitioner's claim of tenancy was obviously a mere pretense; and the respondent's conduct in foreclosing the mortgage, if rough and resolute, still lacked the element of threat and force necessary to constitute the grievance remediable by the proceeding. We are of opinion that upon both points the verdict of the jury is clearly against the evidence. If otherwise, however, still the return discloses a defect in the proceeding which is fatal to its validity.

[1] The statute of forcible entry and detainer, being in derogation of the common law, and authorizing a process by which one may be summarily divested of his right, is to be strictly construed, and the proceeding rigidly restrained within its prescribed limits (Bloom *v.* Burdick, 1 *Hill*, 131; Schneider *v.* Leitzman, 19 *N. Y. Civ. Pro.* 217).

The statute requires that in forcible entry and detainer the applicant must present to the justice [2] "a written petition describing the premises and the interest therein of the petitioner" (*Code Civ. Pro.* § 2235); which means "a description of the particular title, estate or interest under which the petitioner claims" (Schneider *v.* Leitzman, *supra*).*

* The decision above reported was followed in the following special term decision:

CAHILL *v.* WYAND AND ANOTHER.

N. Y. COURT OF COMMON PLEAS, SPECIAL TERM; JULY, 1892.

§§ 2235, 2265.

Forcible entry and detainer—insufficient petition—enjoining execution of warrant.

A justice of a district court in the city of New York does not obtain jurisdiction of summary proceedings in case of forcible entry and detainer where the petition does not contain a particular description of the petitioner's interest in the premises, and an in junction may issue to restrain the enforcement of a warrant issued therein.

Fuchs *v.* Cohn (*ante*, p. 269) followed.

(*Decided July* 19, 1892.)

Motion by the plaintiff for the continuance *pendente lite* of an injunction restraining the issuance and execution of a warrant in summary proceedings for forcible entry and detainer.

The defendant Wyand, on May 19, 1892, presented a petition to the justice of the district court in the city of New York for the tenth judicial district, reading as follows:

"*To the district court of the city of New York for the tenth judicial district.*

"The petition of Wallace Wyand respectfully shows:

"That John Cahill on the 17th of May, 1892, did make an unlawful entry into the lands and premises of this plaintiff which are situate in the Twenty-fourth ward of the city of New York, within the said tenth judicial district, on the easterly side of Washington avenue, being 28 feet in front on said avenue, about 22 feet in the

Here the petition recites merely that the applicant "is the tenant of the premises pursuant to an agreement

rear, by about 56 feet in depth on the north side thereof, and 50 feet in depth on the south side thereof, said premises being known by the number 2128 Washington avenue; and the said John Cahill since said date has forcibly and unlawfully held and detained, and still forcibly and unlawfully holds and detains, this petitioner out of possession of a portion of his said lands and premises.

"That the said premises are shown on the following diagram, and that the portion thereof of which the said Cahill unlawfully holds and detains the said Wyand out of possession is thereon designated by the letter 'A.'

[Here follows diagram.]

"And the said petitioner further says that at the time aforesaid he was and for more than a year prior thereto had been peaceably in the actual possession of said premises, number 2128 Washington avenue, described as aforesaid.

"Dated May 19, 1892.

"Wallace Wyand,

"Petitioner."

Upon this petition a precept was issued requiring the plaintiff in this action, John Cahill, to remove from said premises or show cause why possession of the property should not be delivered to the petitioner.

On the return-day named in the precept, the plaintiff herein appeared and moved to dismiss the proceeding on the ground that the petition was insufficient in that it did not describe the petitioner's interest in the lands. The motion was denied, and thereafter a final order was made awarding possession of the property to the petitioner.

Thereupon this action was brought against said Wyand and WILLIAM G. MCCREA, the justice who made such final order, to enjoin the enforcement of said final order, and the issuance and execution of a warrant thereunder.

A temporary injunction was granted and served with the summons and complaint, and this motion is to continue it pending the action.

J. C. De la Mare, for plaintiff and motion.

Tallmadge W. Foster (*Eustis, Foster & Coleman*, attorneys), for defendant, opposed.

with the landlord." Tenant *simpliciter* is "one
[3] who holds or possesses lands or tenements by a kind of title" (*McAdam's Landl. & Ten.* 45). Whether the applicant was tenant for years, or from year to year, or from month to month, or at will, or at sufferance, is not indicated by the petition; wherein, therefore, "is not a description of the interest of the petitioner, but, at most, an allegation that she had some interest which entitled her to the possession" (Schneider *v.* Leitzman, *supra*). An allegation of interest is not equivalent to a description of the interest.

The complainant should disclose in his petition the nature of his right to the possession, and how
[4] and from whom it was acquired; and an allegation as to his rights, without facts to sustain it, is a legal conclusion (People *ex rel.* Cooper *v.* Field, 52 *Barb.* 198).

A technical objection suffices to defeat the proceeding (People *v.* Smith, 24 *Barb.* 16; People *ex rel.* Decker
[5] *v.* Whitney, 1 *T. & C.* 533). The defect in the de-

Injunction can be granted, if at all, only under subd. 2, § 2265 of the Code of Civil Procedure, "in a case where an injunction would be granted to stay the proceedings in an action of ejectment brought by the petitioner, and upon the like terms."

An injunction would not be granted in an action of ejectment on the ground on which this injunction is sought (Knox *v.* McDonald, 25 *Hun*, 268; Jessurum *v.* Mackie, 24 *Hun*, 624; Armstrong *v.* Cummings, 20 *Hun*, 318; Bliss *v.* Murray, 7 *N. Y. Supp.* 917).

BISCHOFF, J.—That the justice did not obtain jurisdiction because of the omission from the petition in the forcible entry and detainer proceedings of a particular description of the petitioner's interest in the premises, see Fuchs *v.* Cohn (*ante*, p. 269); and an injunction may therefore be properly granted to restrain the enforcement of the warrant (Schneider *v.* Leitzman, 19 *N. Y. Civ. Pro.* 217; Chadwick *v.* Spargur, 1 *Id.* 422; Kiernan *v.* Reming, 7 *Id.* 311; Sherman *v.* Wright, 49 *N. Y.* 227).

Motion granted and injunction continued; $10 costs to abide event.

scription of petitioner's interest in the premises deprived the court of jurisdiction (Schneider *v.* Leitzman, *supra*).

Judgment reversed, and proceeding dismissed, with costs.

BOOKSTAVER, P.J., and BISCHOFF, J., concurred.

MARVIN *v.* MARVIN.

PREYER, APPELLANT, FISHEL *et al.*, RESPONDENTS.

CITY COURT OF NEW YORK, GENERAL TERM; JUNE, 1892.

§ 66.

Attorney's lien—not affected by assignment of judgment.

An attorney's lien upon a judgment for his costs and compensation follows and remains attached to the judgment which has been assigned by the client to a third person.

Where after the recovery of judgment and the issuance of an execution thereon it was assigned by the plaintiff therein to a third person and the amount thereof was thereafter collected by the sheriff,—*Held*, that the attorney had a lien upon the judgment which he had recovered, for his taxable costs and agreed compensation, it being for a reasonable amount, which attached to the judgment in the hands of the assignee, and no notice of such lien was necessary; that the assignee, claiming the money collected on the judgment, could not defeat the attorney's claim by asserting that the judgment was collusive and fraudulent without connecting the attorney with the collusion and fraud.

(*Decided June*, 1892.)

Appeal by Charles H. Preyer, attorney for the plaintiff, from an order of the special term directing the sheriff to pay him the costs of this action as taxed, and denying in other respects a motion made by him that

the sheriff pay him his fees and compensation, for services rendered in the action, out of money collected on execution issued therein.

The facts are stated in the opinion.

Charles H. Preyer, for the motion.

Johnson & Johnson, opposed.

McCarthy, J.—This is an appeal from an order denying a motion for an order directing the sheriff to pay to the attorney for the plaintiff the sum of $103.39, the amount claimed by the said attorney for his fees and compensation, for services rendered in the above-entitled action, out of the moneys realized upon execution issued herein.

Judgment was obtained in favor of plaintiff against the above-named defendant on the 10th day of February, 1892, for the sum of $816.72, and execution immediately issued by Charles H. Preyer, plaintiff's attorney, to the sheriff of the city and county of New York. Under said execution, levy was made, and after levy the said judgment was assigned by the plaintiff to Fishel, Adler & Schwartz (the respondents herein) for the nominal consideration of one dollar. The plaintiff's attorney had no knowledge or intimation of the proposed assignment, and the said assignment was made without his knowledge or consent. The said execution was fully satisfied, and the sum of $816.72 is now in the hands of the sheriff, abiding the determination of the claim of the plaintiff's attorney for compensation for his services. The compensation of the attorney for his services, by arrangement with the plaintiff at the time of the institution of the action, amounts to the sum of $103.39, which sum is a reasonable charge. The reasonableness of the charge is not disputed. The assignees of the judgment, however, contend that the fund is only chargeable with the taxable costs, and that this action was brought upon a

fictitious claim and is fraudulent and void; nevertheless, they are claiming the proceeds of said judgment by virtue of the assignment. There is no allegation that the attorney was conversant with any fraud. The learned justice at special term granted the motion to the extent only of directing the sheriff to pay plaintiff's attorney the costs as taxed—to wit, $21.72. From this order both plaintiff and her attorney appeal.

Section 66 (amended 1879): "The compensation of an attorney or counselor for his services, is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof, in whosesoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment."

In arriving at a proper conclusion, we must keep in mind that the contention here is not a settlement of the case between the parties before or after judgment, and thus the termination of the controversy by a settlement of the claim or a satisfaction of the judgment, but the assignment by the plaintiff for a consideration of one dollar, expressed in the instrument, to Fishel, Adler & Schwartz, none of whom are parties to the judgment, but third parties and strangers to the plaintiff's attorney, who secured the judgment and issued the execution to the sheriff. Thus the judgment was not settled, satisfied or canceled, but simply transferred or handed over to Fishel, Adler & Schwartz, subject to any and all liens and equities which may exist. In other words, all the plaintiff could transfer would be her right, title and interest in such judgment.

The judgment has not been paid over, satisfied or canceled, but, being alive and existing, it matters not

whether it be in the hands of the plaintiff or transferred to any one else; the attorney's lien must necessarily follow and attach. For, in the language of section 66, Code of Civil Procedure, it attaches to a judgment in his client's favor, and the proceeds thereof, in whosesoever hands they may come.

In the case at bar, the judgment has come (no matter how) into the hands of Fishel, Adler & Schwartz, the respondents herein, and the proceeds are in the hands of the sheriff of the city and county of New York, an officer of the court, and therefore subject to its direction. It would be folly to say that by the mere handing over the judgment unpaid, unsettled and unsatisfied, or uncanceled, to a third party, the plaintiff's attorney would be deprived of the lien already fixed and agreed upon between the plaintiff and such attorney; nor of the proceeds of such judgment which had been acquired by the diligence and effort of this attorney. This would be the plainest kind of fraud and the easiest way of encouraging it. No claim can be made that the attorney should have given notice to these respondents. They were not parties to the action nor interested in it until after judgment, execution and levy had been made; they were perfect strangers to the record and to the plaintiff's attorney. How could the plaintiff's attorney know the operations of his client's mind from time to time, or to whom or in what manner she would dispose of the judgment? It was sufficient for him that she and he understood each other as to his lien and the amount of the same. Being a woman (it is said they are changeable), she might notify him every day of a different intention and different person, which would require under such an absurd rule a notice in every case. Neither law nor logic can sanction such a proposition.

The judgment, its entry, and docketing the execution in the hands of the sheriff, all must have contained the name of the plaintiff's attorney, and thus, even after the

assignment, put the respondents on the inquiry. If they proceeded before assignment, or after, without doing this, they took at their peril and subject to all its imperfections. As, for instance, supposing a judgment obtained by default and afterwards assigned was thereafter vacated and set aside and the default opened, could it be said the assignee did not take it subject to all its imperfections and equities? Besides, the statute fixes the position of the plaintiff's attorney and these respondents as to each other.

Section 66, Code of Civil Procedure, attaches to a judgment in his client's favor, and the proceeds thereof, in whosesoever hands they may come. The judgment when entered and perfected was in his client's favor, and belonged to her, and even up to some time after the levy. Respondents may claim their having no knowledge of the attorney's lien or the law in regard thereto, but ignorance of the law is no excuse. The sale or transfer of the judgment (for the lien attaches to the judgment) did not alter its character, the amount of the same, nor the method or process of collecting it. It was all the time the same judgment and between the same parties, and it was not settled between the parties to it. The sheriff successfully collected it under his execution.

The respondents cannot now, after accepting this assignment, claim that the judgment is fraudulent and yet come into court and ask that the proceeds shall be paid over to them. If it is a good and valid judgment as to them, it must be so for all purposes. Besides, if it was obtained by fraud there is no proof of collusion on the part of the plaintiff's attorney in the same. No notice was necessary to be given to the judgment debtor. There was no settlement between the parties; the amount of the judgment was collected out of the property of the judgment debtor by the sheriff under due process of law, but sufficient notice of the attorney's lien has been given to these respondents. It was while the proceeds were

in the hands of the sheriff, or, in other words, while the proceeds are *in transitu*. Payment of the judgment to any other person would be of no avail against him, and he would be entitled to enforce it for the amount of his lien. The authorities, the logic and the equities of the case are clearly in favor of sustaining the attorney's lien. We have carefully examined all the authorities cited by the respondents, and do not think they apply to the question at issue herein.

For these reasons the order appealed from should be reversed, with costs and disbursements to be paid out of the funds in the hands of the sheriff and realized under the execution issued herein; and the motion of plaintiff's attorney that the sheriff be directed to pay to the attorney of the plaintiff herein the amount of his lien for costs and compensation agreed upon—to wit, the sum of $103.39—out of the moneys realized on said execution, is hereby granted, but without costs of said motion.

McGown, P.J., concurred.

NOTE ON THE EFFECT OF CERTAIN ASSIGNMENTS ON ATTORNEY'S LIEN.

I. **Assignment of Cause of Action Pendente Lite.**—Where pending an action for partition the plaintiffs sold their shares of the property and all costs and allowances that they might have by the suit, to a third person, who continued the action by a substituted attorney,—*Held*, that the assignment was subject to and did not affect the lien of the attorney for the plaintiff for costs (Creighton *v.* Ingersoll, 20 *Barb.* 541).

Where pending suit on a note the plaintiff transferred it to a third person, who took it with knowledge of the suit and permitted it to remain in the hands of his assignor's attorney,—*Held*, that the attorney had a lien on the note and a judgment recovered thereon for his costs and compensation, and this although he drew the assignment (Schwartz *v.* Jenney, 21 *Hun*, 33).

II. **General Assignment.**—The fact that a plaintiff after he recovered judgment made an assignment for the benefit of his credit-

ors, does not affect his attorney's lien on the judgment nor prevent his enforcing it by supplementary proceedings (*City Ct. N. Y.*, Feb., 1884, Merchant v. Sessions, 5 *N. Y. Civ. Pro.* 24).

An assignment, *pendente lite*, made by the plaintiffs in an action for the benefit of their creditors, does not affect the lien of their attorneys for the full amount of their reasonable services (Ward v. Craig, 87 *N. Y.* 549, 560).

III. **Assignment of Judgment.**—One to whom a judgment is assigned takes it subject to the lien of the judgment creditor's attorney for services rendered in the action (Marvin v. Marvin, *ante*, p. 274).

In Kipp v. Rapp (7 *N. Y. Civ. Pro.* 385) judgments in favor of the plaintiff were assigned pending appeal, and the court says of such assignments that they might be held inoperative, "as they could not defeat a recovery by the attorney" in an action brought by him upon undertaking given to stay execution pending such appeal.

IV. **Assignment of Attorney's Claim for Services.**—In Chappell v. Dann (1 *Barb.* 17, 24), an attorney, Dann, having recovered a judgment in favor of his client, Humphrey, caused some of the judgment debtor's real property to be sold under execution, and bought it in himself for the amount of the judgment and the expense of the sale, but did not pay for it, and the sheriff sued him therefor. Pending that action he assigned his claim against Humphrey for services to one Chase, who brought an action therefor and recovered judgment, which he assigned to the attorney Dann, who by supplemental answer pleaded these facts, alleged that the action against him was brought for the benefit of Humphrey, and asserted that he had a lien for costs upon the judgment under which the sale was had, and that he bought for the benefit and as the agent of Humphrey but in his own name to preserve the lien. The judgment in Chase v. Humphrey was not received in evidence on the trial, and the general term on appeal sustaining its exclusion, said:

"The evidence was not competent for the purpose of establishing the fact that the defendant purchased as agent of the plaintiff in the execution, because the action there was between persons neither of whom are in any respects parties to this action. Nor was it competent for the purpose of establishing the lien of the defendant as attorney, because if he had one, in the first instance, he lost it irrevocably when he assigned his demand for the services to Chase. The judgments, when recovered for the services, belonged to Chase, and if the defendant had purchased it and was the owner at the time of the trial, the lien, if there was one originally, was

not restored. And as a set-off or counter-claim clearly it was not available. I do not intend to hold that there was a valid lien in favor of the defendant as attorney originally. It is unnecessary to discuss or decide that question, as it must be obvious that such lien, if it existed, was destroyed by the assignment of the claim, and could not be revived by a subsequent purchase of the judgment."

V. **Assignment of Attorney's Lien.**—In *Jones on Liens*, § 226, it is said: "The lien of an attorney for his fees is, like any chose in action, assignable. It is incident to the judgment in which it is attached, and is necessarily as much assignable as is the judgment to which it is incident" (citing Day *v.* Bowman [*Ind.*], 10 *N. East Rep.* 126; Sibley *v.* County of Pine, 31 *Minn.* 201; s. c., 17 *N. W. Rep.* 337).

In another section of the same work (*Jones on Liens*, § 992): "An attorney's lien upon a judgment is assignable (Sibley *v.* County of Pine, 31 *Minn.* 201, 202). In this regard there is no distinction between an attorney's lien and the lien of a mechanic or material-man. There is nothing in public policy nor in the policy or language of the statutes creating these liens which forbids the assignment of them. To take away their assignability would be to take away part of their value. An attorney's lien upon a judgment is a lien of an equitable nature, though in many States it is declared by statute."

An attorney's "personal representative (Magrath *v.* Lord Muskerry, *Vern. & Scriv.* 171; s. c., 1 *Ridg. P. C.* 476; Redfearn *v.* Sowerby, 1 *Swanst.* 84), or his assignee in bankruptcy or insolvency, will be held entitled to enforce this [retaining] lien. So it would seem that the actual members of a firm may enforce a lien for costs earned by their predecessors (Gregory *v.* Cresswell, 14 *L. J. Ch.* 300, 302). And (as the law allows assignments of debts and securities therefor), where a solicitor, having a lien on documents for costs, assigned to his bankers the debt due to him for such costs, together with the benefit of the lien, it was held, in equity, that the banker might enforce such lien. Bull *v.* Faulkner, 2 *De G. & S.* 772" (*Stokes on Liens of Attorneys*, 14).

In Sibley *v.* County of Pine (31 *Minn.* 201), Barnett, an attorney having a lien on a judgment in favor of certain school trustees under General Statutes of Minnesota of 1878, chap. 88, § 16, assigned his claim for services and said lien to plaintiff. The judgment was paid to the defendant, and this action brought to recover the amount of the lien. The court said:

I. "Barnett's lien was assignable. There being nothing in the lien-right in the nature of a personal trust, there is no distinction in

this regard between an attorney's lien upon a judgment and the lien of a mechanic or material-man. Where the lien-holder is intrusted, as a personal trust, with the property bound by the lien, as would be the case where the papers of a client have come into the possession of his attorney in the course of his professional employment, an entirely different case would be presented which we do not now consider. But no such element of personal trust existed in the present case. The lien was merely security for the debt. There is nothing in public policy, or in the language or policy of the statute creating these liens, which forbids their being assigned. A debtor cannot be injured by such assignment, while the creditor will lose part of the benefit of his lien if he cannot assign it. To hold such liens assignable is to follow all the analogies of the law.

"This position is not only, in our opinion, sound in principle, but abundantly sustained by authority. This court has so held in the case of a mechanic's lien (Tuttle *v.* Howe, 14 *Minn.* 113 [145]). In principle that case is decisive of this question. Other courts generally hold the same doctrine (Iaege *v.* Bossieux, 15 *Grat.* 83; Kerr *v.* Moore, 54 *Miss.* 286; Jones *v.* Hurst, 67 *Mo.* 568; Davis *v.* Bilsland, 18 *Wall.* 659; Rogers *v.* Omaha Hotel Co., 4 *Neb.* 54; Skyrme *v.* Occidental Mill & Min. Co., 8 *Nev.* 219; Murphy *v.* Adams, 71 *Me.* 113). The same thing has been held by the federal courts as to maritime liens (Hull of a New Ship, *Davies* [or 2 *Ware*], 199; The Sarah J. Weed, 2 *Lowell*, 555). The doctrine is also generally supported by the text-writers (*Philips on Mech. Liens*, § 55; *Kneeland on Mech. Liens*, § 7). Indeed, the doctrine of those cases which held that such liens were merely personal privileges and incapable of being assigned, may now be considered entirely exploded."

The statute referred to in the foregoing opinion is as follows:

"*Extent of Lien.*—An attorney has a lien for his compensation, whether specially agreed upon or implied, as provided herein.

"*First.* Upon the papers of his client which have come into his possession in the course of his professional employment;

"*Second.* Upon money in his hands belonging to his client;

"*Third.* Upon money in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party;

"*Fourth.* Upon a judgment to the extent of the costs included therein, or, if there is a special agreement, to the extent of the compensation specially agreed on, from the time of giving notice to the party against whom the judgment is recovered. This lien is, how-

ever, subordinate to the rights existing between the parties to the action or proceeding."

VI. **Agreements to Transfer.**—An agreement that the costs or any other recovery in an action shall belong to an attorney passes title thereto and creates an equity therein superior to a right to set off another judgment.

In Zogbaum *v.* Parker (66 *Barb.* 341), Z., the plaintiff, was the owner of a judgment against B., one of the defendants. In an action brought by B. against Z. for false imprisonment, a verdict was rendered in favor of B. Before judgment was entered, B., in pursuance of a previous agreement, assigned the verdict to his attorney in payment for legal services in the action and another indebtedness of $200. *Held*, that the agreement between B. and his attorney, as to the disposition of the proceeds of that suit, was valid. *Held*, also, that the plaintiff had no claim to set off the judgment owned by him against the one recovered in the action brought by B. That the right to set off did not arise until judgment was perfected; and the assignment of the verdict was a complete answer to the claim of set-off.

The court said: "*First.* The original agreement made at the commencement of the suit as to the disposition of the proceeds of the recovery was valid and binding. It was decided in Rooney *v.* Second Avenue R. R. Co. (18 *N. Y.* 368) that an attorney's lien still exists and applies to the amount which was agreed upon as a compensation; and that 'it is still true that the attorney is to be regarded as the equitable assignee of the judgment to the extent of his claim for services in the action.' Presumptively the lien of the attorney extends only to the amount of the taxable costs. . . . Where the judgment is previously agreed to be assigned to the attorney or anybody else, in good faith, for value, the assignee has the prior equity, and cannot be superseded by a right to set-off which subsequently accrued on the recovery of the judgment (Ely *v.* Cook, 28 *N. Y.* 365). . . .

"*Second.* The assignment of the verdict is a complete answer to the claim of the plaintiff to set-off. The right to set-off did not arise till judgment was perfected. There is no set-off against or in favor of a mere verdict or report of a referee in an action for tort. 'On the day of the assignment no right of set-off exists. It was only upon the entry of judgment that the plaintiff came into a situation to claim a set-off either by motion or bill in equity, and before that time the claim of Carter had been assigned for a valuable consideration to his attorney, the defendant' (Roberts *v.* Carter, 38 *N. Y.* 107)."

The court of appeals (55 *N. Y.* 120) affirmed the judgment entered on this decision, saying:

"The plaintiff bases his right to equitable relief upon the insolvency of the defendant, Blodgett, and it is clearly the duty of the court to protect the equities of all persons who have any interest in the demands sought to be set off. The mutual demands of the plaintiff and Blodgett did not arise out of the same business, and there is no inherent equity in favor of the plaintiff. The question is which of these parties has the superior equity? I concur with the conclusions of the learned judge, that the equities of Parker and Ganson are superior to those of the plaintiff. The agreement for their services in presenting the action for false imprisonment to be compensated by the security of the verdict, when obtained, although not effective to transfer the cause of action, attached as an equitable claim to the verdict, and the assignment transferred the title to them. The contract was not unlawful, nor for any reason invalid. The consideration, being for services for obtaining the verdict, gives them a right superior to that of the plaintiff, who occupied no relation to the demand whatever, and was only a common judgment creditor. The only question there can be is as to the $200, which was a precedent debt in favor of Parker, but that was included in the original arrangement, and, we may presume, constituted an inducement, on his part, in undertaking the prosecution; and I see no reason why the insolvency of Blodgett should not inure to his benefit as well as the plaintiff. Mainly concurring in the opinion of Judge TALCOTT, I do not deem it necessary to repeat the authorities cited by him, nor to review the numerous cases cited in the able and elaborate brief of the counsel for the appellant. It is sufficient to say that no one of them is in conflict with the conclusion arrived at" (Perry *v.* Chester Court of Appeals, 53 *N. Y.* 240).

In Ely *v.* Cook (9 *Abb. Pr.*, 366; s. c., 2 *Hilt.* 406) the facts as stated in the report of the decision were as follows:

On the 29th day of November, 1850, Cook, one of the defendants in the present action, had confessed judgment to Ely, the plaintiff. On the 31st day of December, 1851, Cook obtained a discharge under the two-thirds act. In October, 1856, Cook recovered judgment for costs against Ely in a creditor's action which Ely had brought upon the first-mentioned judgment, seeking to set aside an assignment made by Cook. That creditor's action was commenced in 1851. The Messrs. Sherwood, who were Cook's attorneys in that action, agreed with him, when they undertook the defence of the action, that the costs, if any, should belong to them;

and upon the recovery of the judgment for costs Cook assigned it to them.

Ely brought the present action against both Cook and the Messrs. Sherwood, asking that the insolvent discharge be declared void, and that the judgment which he held against Cook should be set off against the judgment recovered by Cook, and which had been assigned to the defendants Sherwood.

The court of common pleas at special term in April, 1858, say, per BRADY, J.:

"It is true that at the time the agreement was made by the Sherwoods with Cook no costs had accrued, and that from the nature of the action brought against the latter costs might not have been granted had he succeeded, but that did not affect the right of Cook to bargain upon the hypothesis that he might recover costs. That doubt was a matter affecting only the employer and the employed, which third persons have no power to interfere with. Having the right to make the agreement, and the agreement not being against the policy of the law, it was binding upon the parties, and must be sustained. From the moment the Sherwoods began to defend the action against Cook, an equity in their favor commenced, and so continued down to the time when the costs were adjusted. They labored for those costs, and having succeeded in the defence, it must be assumed that they earned them by diligence, industry, and skill. They took the risk in reference to the costs, and having done so, the costs never in fact belonged to the defendant in the action. Prior to the Code of Procedure the courts would not refuse to set off one judgment against another because of the attorney's lien, and upon the ground that the equities of the parties were superior to those of the attorneys, the attorney looking in the first instance to the personal security of his client (The People *ex rel.* Manning *v.* The New York Common Pleas, 18 *Wend.* 649; Nicoll *v.* Nicoll, 16 *Ib.* 446). And without reference to the question whether the attorney's lien still exists, although it seems to be settled (Ward *v.* Woodsworth, 1 *E. D. Smith's R.*, 12 *How. Pr. R.*, 186; 11 *Ib.* 100; 20 *Barb.* 541; 21 *Ib.* 17; 4 *Ib.* 47).

"There is little doubt that the principle upon which courts heretofore permitted judgments to be set off must still prevail even if the lien is held to continue. But in this case something more than a mere lien exists, as already stated. The costs that might be awarded were passed to the Sherwoods in anticipation of their recovery as a compensation for their services which would result in that recovery; and as each particular service for which costs were allowed was performed, the right of the Sherwoods to the compen-

sation for that service attached, not by lien alone, but by express agreement. Cook said at or about the time that the agreement was made that he had no means to carry on the suit; that he had failed, made an assignment, and had gone through the insolvent act. It would seem from these circumstances that the Sherwoods looked first to the costs for security, and not to the personal responsibility of Cook, who had declared himself to be irresponsible, and it follows that so far as the cases (*supra*) are founded upon the theory that the attorney relies first upon his client for payment, they have no application to this case. For these reasons I think the defendants Sherwood entitled to judgment."

The court at general term, per DALY, J. (HILTON, J., concurring), says:

"Upon the trial in this suit it was proved that, after the commencement of that action and before an answer was put in, an arrangement was made between Cook and his attorneys, the Messrs. Sherwood, to the effect that the costs of the defense of the action should belong to the attorneys. Mr. John Sherwood swore that Cook came to them, the attorneys, and told them that he had no means to carry on the suit; that he had failed, made an assignment, and had gone through the two-thirds act; that the witness told him that he would succeed in the action, that the suit was frivolous, and that the complaint would be dismissed; that they would go on and defend the action, and that they would get a bill of costs out of the plaintiff for their services, which would belong to them, the attorneys; and that Cook said, 'Certainly, that's all right,' or other words expressing assent to the agreement or arrangement. The attorneys went on, paid all the disbursements, and defended the suit, which was a protracted litigation, having been carried by the plaintiff to the court of appeals; and when judgment was rendered in Cook's favor for the costs above stated, he assigned the judgment to them. The judge below found that, after the commencement of the suit and before the trial, an arrangement and agreement was made between Cook and the Messrs. Sherwood that the costs to be recovered were to belong to them; and I think that he was warranted by the facts in so finding. This agreement was made before the defense of the suit was undertaken by the defendants Sherwood, and the service which they agreed to render and did render was a good consideration for the making of such an agreement. The question of an attorney's lien, so much discussed in the various stages of this case, does not, in fact, arise. By the long-established practice of the courts, the attorney has a lien upon the judgment for his costs, subject, however, to the equitable right of the parties to set off one claim against another; and if the parties settle in fraud

of the attorney's lien, the judgment will be enforced to the extent of the lien. But the defendants Sherwood did not call upon the court to protect a lien, which they had upon the judgment for costs, or interpose any such lien, as against the plaintiff's right of set-off. They are the assignees and owners of the judgment, which has been assigned to them by Cook in consummation of an agreement which he made with them, when they undertook the defense of the suit, that the costs should belong to them. Their right is founded, primarily, upon a transfer or equitable assignment by Cook to them of a thing in expectancy, which was valid and will be sustained by the court. 'Whatever doubts may have existed heretofore,' says WELLS, J., in Field *v.* Mayor, etc., of New York (2 *Seld.* 187), 'the better opinion now is, that courts of equity will support assignments, not only of things in action, but of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility, provided the agreements are fairly entered into, and it would not be against public policy to uphold them.' Before these costs were created, and before it could be known that Cook would ever be entitled to any, when the matter rested in mere expectation and possibility, they made this agreement that they were to have the costs for their services as attorneys; and if any doubt existed before the Code as to the right of any attorney to make such an agreement, none can exist now—the Code having repealed all laws restricting or controling the right of a party to agree with his attorney for his compensation. They gave their services and paid the disbursements in the long course of litigation. Their expectation was realized; the plaintiff failed in his suit, and when a judgment was rendered in Cook's favor for costs against the plaintiff, as the costs, by the previous agreement, belonged to the Sherwoods, Cook assigned the judgment to them. The defendants Sherwood, therefore, cannot be regarded as assignees of a judgment nominally in the name of Cook, but the whole interest in which belonged to them when the judgment was rendered. This case, consequently, is distinguishable from The People *v.* Manning (18 *Wend.* 649), which was also a judgment for costs assigned to the attorney, for there no such prior agreement existed; in addition to which that case is of no authority, as it was subsequently reversed. And the case before us is equally distinguishable from Nicoll *v.* Nicoll (16 *Wend.* 446), in which the attorney, relying simply upon his lien upon the judgment for his costs, was not allowed to interpose it against the appellant's statutory right to his set-off.

"The defendants Sherwood, then, being the parties who had the sole interest in this judgment when it was rendered, through their previous agreement with Cook, the plaintiff had no claim to set off

his judgment against it; and, having failed in this, I do not see that he could be entitled to any judgment."

An appeal from the judgment entered on this decision, taken by the plaintiff to the court of appeals, resulted in its affirmance, the court saying:

"If we adhere to the case of Rooney v. The Second Avenue R. R. Co. (18 *N. Y. Rep.* 368), there would not seem to be much doubt upon this subject. . . . In that case the agreement between the attorney and his client was sustained; thus holding that the attorney, independent of any agreement, had a lien upon the judgment recovered for his costs to the extent of the amount thereof, but that it was competent for the attorney and client to fix a larger or different amount of compensation; and the right of the attorney under such an agreement would be protected. That case is therefore an authority directly in point to sustain the judgment rendered in this action. The agreement made here is a fact established in this case, and it can be decided on that ground independent of the question of lien of the attorney for costs as such. Here the attorney was to have the whole amount of the recovery as his compensation for carrying on the defense to the action prosecuted by this present plaintiff to set aside Cook's assignment. It was lawful to make such an agreement. It was based upon a good consideration—namely, services rendered and to be rendered in the defense of that action. After such agreement was made, Cook ceased to have any interest in the recovery in this action. Whatever judgment he should recover therein of right belonged to the defendants Sherwood and not to the defendant Cook. In executing to them the assignment of November 6, 1856, he did but do what in equity he would have been compelled to do. The plaintiff has therefore no legal or equitable claim to have this judgment—which, although recovered in the name of Cook, did not in fact belong to him, nor had he any interest therein—applied in reduction of the debt which Cook owes to him upon his judgment."

See also, on this subject, Turno v. Parks, 2 *How. Pr. N. S.* 35; Prouty v. Swift, 10 *Hun*, 232; Naylor v. Lane, 5 *N. Y. Civ. Pro.* 150; Channing v. Moore, 13 *Id.* 349.

An agreement between a client and his attorney that the attorney shall have a lien for his services to a certain amount constitutes a valid equitable assignment of the judgment *pro tanto*, which attaches to the judgment as soon as entere (21 *Am. L. R.* 79). (See also Stewart v. Hilton, 19 *Blatch. U. S.* 290).

Such agreements may be by parol (Williams v. Ingersoll, 89 *N. Y.* 518; Freeholders v. Bank, 38 *N. J. Eq.* 36). (See also Langworth v. Hendy, 2 *Dis. Ohio*, 73; Cunningham v. McGrady, 2 *Baxt.* [*Tenn.*] 141.)

VII. **Assignment to Attorney.**—An assignment of a judgment by the judgment creditor to his attorney, in payment or security for his fees in the suit, is effectual to prevent a set-off against such judgment of another judgment previously recovered by the judgment debtor against the judgment creditor (Benjamin *v.* Benjamin, 17 *Conn.* 110; Rumrill *v.* Huntington, 5 *Day* [*Conn.*] 163; Rice *v.* Garnhart, 35 *Wis.* 282). If an attorney undertakes the defense of a suit for an insolvent client in consideration that the costs that might be recovered should belong to him, and he recovers a judgment for costs and assigns this to the attorney, a judgment against the defendant cannot be set off against such judgment for costs" (*Jones on Liens*, §§ 222, 223).

It is well settled that the attorney's lien makes him an equitable assignee of a judgment for costs and prevents set-off (Naylor *v.* Lane, 5 *N. Y. Civ. Pro.* 150; Marshall *v.* Meech, 51 *N. Y.* 148; Dimick *v.* Cooley, 3 *N. Y. Civ. Pro.* 146; Coughlin *v.* N. Y. Cent. R. R. Co., 77 *N. Y.* 443; Wright *v.* Wright, 70 *Id.* 96; Kipp *v.* Rapp, 7 *N. Y. Civ. Pro.* 385).

It will have this effect even without an actual assignment of the judgment to the attorney (Wilkins *v.* Batterman, 4 *Barb.* 47, and cases last above cited).

In Wilkins *v.* Batterman (4 *Barb.* 47) the court says:

"An attorney has a lien on a judgment recovered by him for his costs. He is equitably entitled to the costs as a compensation for his labor and expense of prosecuting or defending the suit. He is regarded as an assignee of the judgment to the extent of the costs included therein. . . . In Martin *v.* Hawkes (15 *John.* 405) it was decided that the attorney stood in the situation of an assignee of the judgment to the extent of his costs; and that he also stood in the same equity that he would have done had the judgment been assigned to him. . . . If the attorneys of Wilkins stood in the situation of assignees, they ought to be entitled to all the rights incident to that character."

Where the judgment is assigned to the attorney, the lien becomes merged therein, and the attorney's interest is one of ownership (Bishop *v.* Garcia, 14 *Abb. Pr. N. S.* 69; Dodd *v.* Brott, 1 *Minn.* 270; Naylor *v.* Lane, 5 *N. Y. Civ. Pro.* 150; Terney *v.* Wilson, 16 *Vt.* 282; Sharley *v.* Bellows, 4 *N. H.* 347; Dunkin *v.* Vandenbergh, 1 *Paige*, 62; Gridley *v.* Garrison, 4 *Id.* 647). (*But see* Nicoll *v.* Nicoll, 16 *Wend.* 446; Zogbaum *v.* Parker, 55 *N. Y.* 120; Firmenich *v.* Bovee, 1 *Hun*, 232; Davidson *v.* Alfaro, 16 *Hun*, 353; s. c. 80, *N. Y.* 660; Eberhardt *v.* Schuster, 10 *Abb. N. C.* 374; Currier *v.* Boston R., 37 *N. H.* 223; Boyer *v.* Clark, 3 *Neb.* 161.)

JANEWAY *v.* HAFT *et al.*

SUPERIOR COURT OF BUFFALO, SPECIAL TERM; JULY, 1892.

§§ 3050.

Undertaking on appeal from justice's court—liability of sureties.

The sureties in an undertaking given to stay execution pending an appeal from a justice's court to a county court, to the effect that "if the appeal is dismissed, or if judgment is rendered against the appellant, in the appellate court, and an execution issued thereupon is returned wholly or partly unsatisfied, the sureties will pay the amount of the judgment or the portion thereof remaining unsatisfied, not exceeding a sum specified," are not liable for a judgment rendered against such appellant in the justice's court, where upon such appeal the judgment appealed from was reversed and a new trial ordered in the justice's court. To charge the sureties with liability, there must be a judgment rendered against the appellant in the appellate court.

Smith *v.* Crouse (24 *Barb.* 433); Gardner *v.* Barney (24 *How. Pr.* 467); Robinson *v.* Plimpton (25 *N. Y.* 484), distinguished and not followed.

(*Decided July* 8, 1892.)

Demurrer by defendant to plaintiff's complaint on the ground that it does not state facts sufficient to constitute a cause of action.

The facts appear in the opinion.

Edward T. Durand, for defendant and demurrer.

Henry D. Williams, for plaintiff, opposed.

TITUS, C.J.—It appears from the complaint that on the 26th day of February, 1891, the plaintiff recovered a judgment in the municipal court of Buffalo against the defendant for $117.47 damages and $7 costs; that the defendant took an appeal from the judgment to the general term of this court; that the court ordered a new trial before the municipal court, and stayed proceedings on the judgment and execution until the determination of that case. The new trial in the court below resulted in a judgment in favor of the plaintiff, and against the defendant, for $140.83 damages and costs. An execution was issued on that judgment, and returned wholly unsatisfied.

The undertaking on the original appeal was given pursuant to section 3050 of the Code of Civil Procedure for the purpose of staying execution pending the appeal. It was conditioned that "if the appeal is dismissed, or if judgment is rendered against the appellant, in the appellate court, and an execution issued thereupon is returned wholly or partly unsatisfied, we, the said sureties, will pay the amount of the judgment, or the portion thereof remaining unsatisfied, not exceeding the sum of $250."

This, in substance, is the language of section 3050 of the Code; and it is now claimed by the plaintiff that the condition of the undertaking has become operative by reason of his failure to collect the judgment obtained on the trial in the court below.

Under section 356 of the old Code, the condition of the undertaking required to stay execution was "to the effect that if judgment be rendered against the appellant, and execution thereon be returned unsatisfied in whole or in part, the sureties will pay the amount unsatisfied." It has been held under this section, where the facts were quite similar to the case before us, that the sureties were liable for the judgment obtained in the court below whenever the condition became operative by reason of a

failure to reverse the judgment (Lowry *v.* Tew, 25 *Hun*, 257).

In Humerton *v.* Hay (65 *N. Y.* 380) an undertaking was given, on appeal from the justice's court, for a new trial in the appellate court, and a judgment was finally rendered in the appellate court against the appellant. It was held in an action on the undertaking given to stay the execution that this section of the Code had reference to the judgment obtained in the appellate court, and the plaintiff was allowed to recover.

In Smith *v.* Crouse (24 *Barb.* 433) where the defendant in a justice's court judgment gave an undertaking to stay execution pursuant to section 356 of the old Code, pending an appeal to the county court, where the judgment was reversed, and on appeal to the supreme court the judgment of the county court was reversed and that of the justice affirmed, it was held that the sureties were liable on the undertaking for the whole judgment, including costs, in the supreme court; the court saying that the language of the undertaking was broad enough to cover the judgment in the supreme court, not being limited in phraseology to the county court.

In Gardner *v.* Barney (24 *How. Pr.* 467) an appeal was taken to the general term from the judgment of the special term, and that court reversed the special term, and, on appeal to the court of appeals, that court reversed the general term. It was held that the sureties in an undertaking given pursuant to section 335 were liable for the costs to the court of appeals; that the affirmance spoken of in the undertaking is an affirmance of any legally constituted tribunal having cognizance of the subject of the litigation.

Robinson *v.* Plimpton (25 *N. Y.* 484) was an action on an undertaking given on appeal from the judgment of the special term under section 335 of the old Code, where the judgment of the special term was reversed, and, on appeal to the court of appeals, the judgment of

the general term was reversed and that of the special term affirmed. It was held that the sureties on the undertaking given on appeal from the special term were liable; that it was within the language of the Code and of the undertaking.

These cases seem to turn upon the language of the statute and of the undertaking, and all recognize the fact that the language used does not limit the liability of the surety to the judgment of the court to which the appeal is taken. It will be observed that section 3050 does not follow the general language of section 356 of the old Code, "that if judgment is rendered against the appellant, and execution thereon returned unsatisfied," etc., but places a limitation upon the liability of the sureties —"If the appeal is dismissed, or if judgment is rendered against the appellant, in the appellate court, and an execution issued thereupon is returned" unsatisfied, etc. To charge the sureties with liability under this section, there must be a judgment rendered against the appellant in the appellate court. Can it be said a judgment was rendered against the appellant in this court on the appeal? In case of no appearance of the defendant in the municipal court, and a judgment is taken against him by default, he may apply to that court, and it has power to open the default and allow him to come in and defend; and, if a transcript has been filed, he may apply to the special term of this court, and it may open the default, and order a new trial in the municipal court upon such terms as may be just; or he may appeal under the Code, and stay judgment, and the court may, on such appeal, stay or set aside the judgment, and order a new trial in the court below, as was done in this case. Can it be said that such an order is a judgment? No execution was issued against the appellant on a judgment rendered against him in the appellate court. The judgment which the plaintiff now seeks to enforce is a judgment given on a new trial in the court below, and,

by the terms of the undertaking, the sureties agreed to pay the judgment rendered in the appellate court, thus limiting their liability to the judgment rendered in this court.

Since section 3050 of the Code of Civil Procedure is a re-enactment of section 356 of the old Code, the change which limits the liability of the surety to a judgment rendered in the appellate court is significant, and some evidence that the revisers intended what the language seems to indicate they did, having in view the fact that the courts had practically extended the liability of the sureties to the payment of the debt whenever it should be finally determined against the appellant in any court. In the absence of any authority enlarging the liability of the surety under this execution, so as to charge him upon the facts in this case, I think the court should follow the plain reading of the statute. If this is done, the sureties are not liable, and the demurrer should be sustained.

PEOPLE *ex rel.* OAK HILL CEMETERY ASSOCIATION *v.* PRATT *et al.*

SUPREME COURT, FIFTH DEPARTMENT, MONROE COUNTY SPECIAL TERM; JUNE, 1892.

§ 3240.

Costs—what taxable in special proceeding.

Where, upon appeal to the court of appeals from an order of the general term of the supreme court modifying an order of the special term made upon hearing of *certiorari* to review an assessment, the orders of both the special and general terms are reversed

and the assessment vacated, with costs to the relator in all courts, the relator is entitled not merely to motion costs at general term and in the court of appeals, but to costs at the rates allowed for similar services in an action brought in the same court.

Rensselaer & Saratoga R. R. Co. *v.* Davis (55 *N. Y.* 147); *In re* Manhattan Sav. Inst. (82 *Id.* 142); *In re* P. E. Public School (86 *Id.* 896); *In re* Holden (126 *Id.* 589), followed.

(*Decided June* 27, 1892.)

Motion by the relator for a new taxation of costs.

The facts are stated in the opinion.

H. F. Remington, for relator and motion.

C. D. Keihel, for defendant, opposed.

DAVY, J.—These proceedings were taken under chapter 269 of the Laws of 1880 to correct the assessment on the relator's property for the year 1890. The special term reduced the assessment from seventy-five to fifty-two thousand dollars, but no costs were allowed by the court to either party. From the special term judgment the relator appealed to the general term, and the respondent also appealed from that part of the decision reducing the assessment. The general term affirmed the judgment of the special term, without costs. From this judgment the relator appealed to the court of appeals, and the respondent also appealed from so much of the judgment as reduced the assessment. The court of appeals reversed the judgment of the special and general terms, and vacated the assessment, with costs to the appellant in all of the courts.*

The county clerk, in taxing the costs, has allowed

* The special term opinion filed upon the hearing of the *certiorari* is reported in 14 *N. Y. Supp.* 551; that of the general term on appeal therefrom in 38 *St. Rep.* 598; s. c., 14 *N. Y. Supp.* 804; and the opinion of the court of appeals in 29 *N. E. Rep.* 7.

the relator motion costs only in the general term and in the court of appeals. The relator now moves for a retaxation of costs, on the ground that the costs should have been taxed as in an action.

The application to vacate an assessment under the Laws of 1880, c. 269, is a special proceeding, and costs are in the discretion of the court. The power of the court to award costs in special proceedings is regulated by section 3240 of the Code of Civil Procedure, which provides that costs in special proceedings in a court of record and upon appeal therefrom may be awarded to either party in the discretion of the court, and, when allowed, they shall be at the rates allowed for similar services in an action brought in the same court.

It was held in Rensselaer & Sar. R. R. Co. *v.* Davis (55 *N. Y.* 147) that the allowance of costs in special proceedings, other than the special cases embraced within section 318 of the Code of Procedure, is governed by chapter 270 of the Laws of 1854. The court, in referring to the act, says: "We are of the opinion that the costs referred to in that act are those to which the prevailing party in an action is of right entitled." The court below adjusted the costs the same as in an action. The appellant contended that, inasmuch as the appeal was from an order, the allowance of more than $10 costs at each special and general term was an error; but the court of appeals held that chapter 270 of the Laws of 1854, § 3, authorizing the allowance of costs in special proceedings on appeal, is in the discretion of the court, and, when allowed, they were at the rate allowed for similar services in civil actions, and that the respondent was entitled to full costs upon appeal, as in an action.

Some changes have been made in the phraseology of that act since that decision was made, but none which affect the construction to be given to the question of costs in these proceedings. Section 3240 was substantially a re-enactment of the provisions of chapter 270 of

the Laws of 1854, and the decisions under that act are applicable to cases of this character bearing upon the question of costs (*In re* Manhattan Sav. Inst., 82 *N. Y.* 142; *In re* Protestant Episcopal Public School, 86 *Id.* 396; *In re* Holden, 126 *Id.* 589).

The motion, therefore, for a retaxation of costs must be granted, with $10 costs to the relator.

MICHEL *et al.*, APPELLANTS, *v.* COLEGROVE, RESPONDENT.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL TERM; JULY, 1892.

§§ 910, 1002.

New trial—motion for, on newly discovered evidence—suppression of commission.

A motion by the plaintiffs in an action to set aside a judgment and to suppress a commission, the depositions taken under which had been read in evidence on the trial by the defendant, made on the ground that since the trial the plaintiffs had discovered that the defendant had furnished the witness with copies of the interrogatories annexed to the commission, and instructed him what answers to make, and he had followed such instructions, cannot be founded on affidavits only, but should be made on a case and exceptions, in addition to the affidavits.

(*Decided July* 5, 1892.)

Appeal by plaintiffs from an order of the special term denying a motion for a new trial, and for other relief.

The opinion states the facts.

Henry Daily, Jr., for plaintiffs, appellants.

Franklin Pierce (*Thornall, Squires & Pierce*, attorneys), for defendant, respondent.

GILDERSLEEVE, J.—This order denied the motion of plaintiffs to set aside the judgment of the special term herein, and to suppress the deposition of one George Battelson, with leave to renew the motion so made upon a case and exceptions, in addition to the affidavits, upon which alone the motion was made. Plaintiffs' motion was founded on affidavits setting forth the fact that since the entry of the judgment herein plaintiffs had learned that defendant, who had caused the testimony of one Battelson to be taken by commission in London, had, previous to the execution of the commission, written said Battelson a letter, inclosing a copy of the interrogatories, and indicating the answers that said witness should give, which instructions were duly followed by said witness; and plaintiffs asked to have said deposition suppressed, and the judgment set aside, on this newly discovered evidence. The court held that such a motion should be made on a case and exceptions, as well as the affidavits setting forth the nature of the newly discovered evidence, and denied the motion, with leave to renew on such case. We are of opinion that the court below correctly indicated the practice to be followed in such a case, and that the order was promptly granted (Holmes *v.* Evans, 37 *St. Rep.* 369; s. c., 13 *N. Y. Supp.* 610; Anon., 7 *Wend.* 331; Warner *v.* Western Transportation Co., 5 *Robt.* 499. See, also, Russell *v.* Randall, 123 *N. Y.* 436).

The order appealed from should be affirmed, with $10 costs and disbursements.

DUGRO, J., concurred.

BRADLEY, RESPONDENT, v. SHAFER AND ANOTHER, APPELLANTS.

SUPREME COURT, THIRD DEPARTMENT, GENERAL TERM; JULY, 1892.

§ 723.

Amendment of complaint—when should not be ordered on trial—basis of damage in action by parent for enticing away of his child.

Where, in an action brought against a husband and wife to recover damages for the enticing by the wife of the plaintiff's daughter from his home and keeping her at defendants' house, the complaint demanded judgment against the wife only, and the jury, under instructions that the wife was the real defendant, "although her husband is joined with her, because, as the law was when this action was brought, a married woman could not be sued for tort alone," brought in a verdict in favor of the plaintiff against the defendant for $2500,—*Held*, that the complaint could not be amended after the rendition of said verdict by inserting a demand for judgment against the husband; that although, under the law as it existed at the time the action was brought, the husband was a necessary and proper party defendant, and the judgment should be collected from him, the amendment was improper, having been made after verdict, as its effect was to make a verdict which the jury never in fact rendered; that the husband was jointly liable with the wife for the damages found, and a separate verdict against either would be improper; and, therefore, the judgment should be reversed, and a new trial granted as to both defendants.

Where, in such a case, it appeared that the plaintiff's daughter was seduced by the defendants' son and that his mother connived at and aided him therein and made opportunity for the continuance of the unlawful commerce, *it seems* that such seduction may be considered in determining the question of damages.

(*Decided July* 2, 1892.)

Appeal by the defendants from a judgment entered upon the verdict of a jury rendered at the Albany county circuit, and from an order denying a motion for a new trial.

The facts are stated in the opinion.

Frank Kampfer, for defendants, appellants.

Eugene Burlingame (*Henry T. Sanford*, attorney), for plaintiff, respondent.

PUTNAM, J.—This is an appeal from a judgment in favor of plaintiff, entered February 4, 1891, and from an order denying a motion made to set aside the verdict and grant a new trial because the verdict is against evidence and the damages excessive, and also from an order allowing an amendment to the complaint after the verdict.

The action is for wrongfully and maliciously enticing plaintiff's daughter from the home of her parents to defendants' house, and there keeping her under the control of defendants against the wish and consent of plaintiff. She was seduced by defendants' son in the house of defendants, while thus kept away from her own parents. The complaint in this case, after stating the plaintiff's alleged cause of action, contained the following prayer for judgment: "Whereupon the plaintiff and his family have been brought into disrepute, . . . to his damage $5000, for which amount plaintiff demands judgment against the defendant Margaret Shafer, and costs."

The trial judge, in his instructions to the jury, remarked: "The defendant Margaret Shafer, who is the real defendant here, although her husband is joined with her; that is because, as the law was when this action was brought, a married woman could not be sued for a tort alone; . . . so that in this case the husband

was made a party only because the law required, in order to maintain the action, that he should be joined with his wife, she being the person against whom the tort is alleged." The case states that "the jury returned a verdict in favor of the plaintiff for $2500 damages."

Afterwards, on motion of plaintiff, the court ordered "that the prayer of plaintiff's complaint be, and the same is hereby, amended to conform to the facts proven, and so as to demand judgment for damages against both defendants."

I think that this order was inadvertently granted by the court. It was made after the rendition of the verdict. The jury, in bringing in a verdict of $2500 for the plaintiff, rendered it in pursuance of the prayer of the plaintiff's complaint against the defendant Margaret Shafer. They did not and could not render such a verdict against Robert Shafer, for the reason that no such verdict was claimed in the complaint. Hence the order of the court has the effect of creating a verdict against the defendant Robert Shafer that was not in fact given by the jury.

It is well settled that after a verdict the complaint cannot be amended so as to increase the amount claimed (Bowman *v.* Earle, 3 *Duer*, 695; Decker *v.* Parsons, 11 *Hun*, 296; Dox *v.* Dey, 3 *Wend.* 356; Corning *v.* Corning, 6 *N. Y.* 104; Pharis *v.* Gere, 31 *Hun*, 443).

In this case no recovery was demanded of the defendant Robert in the complaint, but the demand for judgment was expressly made against the defendant Margaret Shafer alone, and the complaint so remained until after the rendition of the verdict. The effect of the order was to increase the amount claimed from the defendant Robert from a nominal sum to $5000. Within the above authorities this order was unauthorized. This action was begun in 1889, hence chapter 51 and chapter 248 of the Laws of 1890 did not apply. (See Hill *v.* Duncan, 110 *Mass.* 238, 239.) Therefore the hus-

band was a proper and necessary party defendant in the action, and judgment should be collected from him (Fitzgerald *v.* Quann, 33 *Hun*, 652–658; aff'd 109 *N. Y.* 441; Mangam *v.* Peck, 111 *N. Y.* 401; Bennett *v.* Bennett, 116 *N. Y.* 597).

The complaint in this case should have been amended before the verdict. Doubtless the court, under section 723 of the Civil Code, on motion, could have allowed such an amendment at any time before the submission of the case to the jury. After the verdict, as we have seen, the court possessed no such power. The effect of such an amendment and of the order in question was to make a verdict for the jury never in fact rendered. Therefore, as to the defendant Robert Shafer, the order in question and the judgment must be reversed, and a new trial granted. But, as we have seen, the husband is a necessary party defendant. He is liable to pay the judgment (Fitzgerald *v.* Quann, 33 *Hun*, 652–658). He is jointly liable with his wife. It is not a case where a separate verdict against either would be proper. Hence the orders and judgment should be reversed, and a new trial granted as to both defendants. (See Pollock *v.* Webster, 16 *Hun*, 104, and kindred cases.)

It is urged by defendant that there should be a new trial, because the damages were excessive; that the seduction of plaintiff's daughter by defendants' son did not properly enter into the question of damages; that for that injury plaintiff has a cause of action against George Shafer. The trial court instructed the jury that they had no right to give plaintiff a verdict because defendants' son seduced the girl, unless they found that the mother did connive, did aid, or did assist in bringing about the seduction, and either originally enticed the daughter away from the father for that purpose, or subsequently entered into some arrangement to bring it about. No exception was taken to the charge of the judge. Had an exception been taken, I am not prepared

to say that, if the jury believed all that the witness Mary Bradley testified to, they might not properly consider her seduction on the question of damages. According to this witness, Margaret Shafer persuaded, and, in fact, almost coerced, her to leave and to remain away from her parents at the house of said defendants. Margaret knew of the seduction of the witness by her son the day it first occurred. She knew that the witness and her son were having unlawful commerce in her house. She knew the bad character of her son. Yet she prevented the witness from returning to her parents, and knowingly kept her exposed to the solicitations of her son, making no effort to put a stop to the immoral intercourse going on. Margaret absented herself for days, leaving her son and the witness alone together. I am inclined to think that there was evidence in the case from which the jury might, if they believed the state ments of the witness Mary Bradley, as they could, find that the defendant Margaret Shafer, having induced this young girl to leave her parents and sojourn at her house under her care and charge, knowingly connived at the commerce between the girl and her son, carried on without objection on her part. I am therefore not prepared to say that the matter was not properly submitted to the jury by the learned trial judge, or that the jury, believing the statements of the witness Mary Bradley, could not consider the seduction on the question of damages, and hence that the verdict should be set aside on the ground that the damages were excessive. But for the reasons above stated the orders and judgment should be reversed, and a new trial granted, costs to abide the event.

HERRICK, J., concurred.

MAYHAM, P.J., concurred upon the ground first stated in the opinion of PUTNAM, J.

MICHEL *et al.*, APPELLANTS, *v.* COLEGROVE, RESPONDENT.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL TERM; JULY, 1892.

§§ 910, 1002.

New trial—when not granted on newly discovered evidence—suppression of commission.

Where by the exercise of proper diligence facts upon which a new trial on the ground of newly discovered evidence is asked, could have been discovered before the trial, the party making the motion is estopped from the relief sought by reason of his negligence and laches. If the least fault be imputed to the moving party, he will ask for relief in vain.

A judgment will not be vacated for the purpose of allowing the defeated party to attack the credibility of the witnesses of the successful party or to contradict them, or to show that they testified falsely; nor can a new trial be obtained either for the purpose of furnishing new cumulative evidence or for the purpose of destroying the cumulative evidence of the successful party.

A motion for a new trial on the ground of newly discovered evidence and to suppress a commission will be denied where the motion is made upon the ground that since the trial the plaintiffs who make the motion have discovered that the defendant had advised a witness examined in London under a commission what answers to make to the interrogatories propounded, and the witness had followed such instructions, where it does not appear that the defendant gained anything thereby or that the witness would testify differently if re-examined and his testimony was not controlling, but cumulative. The conduct of the defendant, while inexcusable and calling for severe condemnation, not being a wrong from which it appeared that the de-

fendant derived any benefit, does not afford sufficient reason to entitle the motion to prevail, and although it would furnish ground for suppressing the commission in advance of trial, it will not after trial do so where the commission was issued two years before the trial; and the plaintiffs knew of the answers made to the several interrogatories, and might with reasonable diligence have learned of the conduct of the defendant.

(*Decided July* 5, 1892.)

Appeal by the plaintiffs from an order of the special term denying a motion made by them upon a case and exceptions and affidavits to set aside the judgment and for a new trial, and also to suppress the deposition of the witness taken under commission.

The facts are stated in the opinion.

Henry Daily, Jr., for plaintiffs, appellants.

Franklin Pierce (*Thornall, Squires & Pierce*, attorneys), for defendant, respondent.

GILDERSLEEVE, J.—This is an appeal from an order of the special term, by Judge MCADAM, dated March 24, 1892, denying plaintiffs' motion to suppress the deposition of one George Battelson, taken under a commission, and to set aside a judgment of the special term, entered herein, and for a new trial.

This motion was made upon a case and exceptions, and upon affidavits setting forth the fact that, since the entry of the judgment herein, plaintiffs had learned that defendant, who had caused the testimony of one Battelson to be taken by a commission in London, had, previous to the execution of the commission, written said Battelson a letter, inclosing a copy of the interrogatories, and indicating the answers that said witness should give, which instructions were duly followed by said witness. In an affidavit, one of the plaintiffs stated that said Battelson informed him, when in London, sub-

sequent to the trial herein, that before the execution of said commission he (said Battelson) received said letter from defendant, and answered the interrogatories as directed by defendant.

The defendant, in his affidavit, used in opposition to the motion, admits the writing of the letter to Battelson, but disclaims any intention to direct Battelson in the answers he was to make to the interrogatories or in any way to influence him. He further says, by way of explanation, that he had personal knowledge of all the facts stated in his letter, and that he also knew that Battelson knew the same facts; and he positively swears that each and every one of the answers of Battelson to the interrogatories in question was true; and that the occasion of writing the letter arose from a letter written to him by Battelson, in which Battelson set forth the facts as to which he subsequently testified, under the commission, and asked him (defendant) to suggest the form of answers to be used by him, said Battelson; and that said letter was written by defendant without any consciousness at the time that it was improper or indelicate for him to suggest the forms of the answers, and without any intent whatever of in any way influencing the evidence of said Battelson.

This letter of the defendant certainly indicates a disregard of the proprieties that all honorable men observe in the conduct of any litigation, however bitter, and is a trespass upon the code of ethics which should control under such circumstances, that calls for severe condemnation by this court (*In re* Eldridge, 82 *N. Y.* 161; Butler *v.* Flanders, 44 *N. Y. Super.* 531; Graham *v.* Carleton, 9 *N. Y. Supp.* 392). We deem the conduct of the defendant in this respect inexcusable. But from a careful examination of all the evidence we are not satisfied that it was a wrong from which the defendant derived any benefit. This conduct of the defendant, therefore, does not afford sufficient reason to entitle the

motion to prevail. The plaintiffs knew two years before the trial that a commission had been issued for the examination of Battelson, and they knew what answers he had made to the several interrogatories. Yet no motion was made to suppress. The excuse is that the facts were not known until after the trial. But could they not, by the exercise of proper diligence, have been discovered before? It is reasonable to suppose they could have been, and therefore the plaintiffs are estopped from the relief sought by reason of their negligence and laches (see *Baylies' New Trials & App.*, pp. 524, 525, and cases there collected; Quinn *v.* Lloyd, 31 *N. Y. Super.* 255; Smith *v.* Nelson, 62 *N. Y.* 288). If the least fault be imputable to the plaintiffs, they will ask for relief in vain (3 *Grah. & W. New Trials*, 1026; Weston *v.* Railway Co., 42 *N. Y. Super.* 162).

Again, the testimony was not controlling, but cumulative; and there is enough in the case without the testimony of said Battelson to sustain the judgment rendered. There is no reason to believe that Battelson would testify differently if re-examined; nor is there any reasonable certainty that a new trial would produce a different result. The disclosures made by the evidence upon which the plaintiffs rested their motion would be of no value upon a new trial, except by way of affecting the credibility of Colegrove and Battelson. A judgment will not be vacated for the purpose of allowing the defeated party to attack the credibility of the witnesses of the successful party, or to contradict them, or to show that they have testified falsely. (See Smith *v.* Lowry, 1 *Johns. Ch.* 320; McIntire *v.* Young, 39 *Amer. Dec.* 447; Starin *v.* Kelly, 47 *N. Y. Super.* 291; Emmerich *v.* Hefferan, 53 *N. Y. Super.* 98).

The plaintiffs now seek to destroy the judgment by removing or destroying the cumulative corroborative evidence in Battelson's deposition. But a new trial cannot be obtained either for the purpose of furnishing new

cumulative evidence or for the purpose of destroying the cumulative evidence of the successful party. (See *Baylies' New Trials and App.* 525, and cases there collected).

We quote, with entire approval, from the decision of Judge McAdam in disposing of this motion: "This rule is settled: that if a witness, examined on commission, is instructed by the party in interest how to testify, the commission will be suppressed, at the instance of the adverse party, on the ground that such conduct is prejudicial to him, corrupting to the witness, an abuse of process, and a fraud on the court, interfering with pure administration of justice. But suppressing a commission in advance of the trial and granting a new trial after an adverse judgment is quite a different thing. A judgment is intended to terminate a litigation and to conclude the parties as to every question raised or which might have been raised before the final result was reached; and rights so lost may never be regained." For the reasons above stated it follows that the order appealed from must be affirmed, with $10 costs and disbursements.

Freedman and Dugro, JJ., concurred.

HUNTER, RESPONDENT, *v.* MANHATTAN RAILWAY CO. *et al.*, APPELLANTS.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL TERM; JULY, 1892.

§ 1023.

Findings—notation on request to find.

The omission of a court before whom an action was tried without a jury to comply with the letter of section 1023 of the Code of Civil Procedure, and note upon the margin of each request to find its disposition thereof, will not warrant a reversal of its judgment if such neglect is not prejudicial to the appellants; but *it seems* where requests to find are disregarded, and no response made to any of them, the court neglects its duty; and, if the error is prejudicial to the appellants, the judgment should be reversed.

An indorsement upon proposed findings of fact and conclusions of law that "each of the within requests is to be marked 'Refused,' except so far as covered by the findings of fact and conclusions of law settled and signed by me," is not a strict compliance with the requirements of the Code of Civil Procedure (§ 1023), inasmuch as its ruling are indorsed upon the proposed findings, instead of being noted in the margin of the statement, as required in the statute; but as the action of the court indicated the "manner in which each proposition has been disposed of," it is a substantial compliance with the terms of the statute.

The fact that in determining a case tried before it without a jury the court indorsed its disposition of proposed findings upon the back thereof and did not note them in the margin is not properly before the general term for review upon appeal from the judgment, and is not ground for the reversal of the judgment. The better practice is to apply to the court below to have the

omission supplied, and to have the mistake, if one, corrected, and, in the event of the request being refused, to make the application and refusal a part of the record.

(*Decided July* 5, 1892.)

Appeal by the defendants from a judgment of the special term rendered in favor of the plaintiff.

The facts appear in the opinion.

Davies, Short & Townsend, for defendants, appellants.

I. O. Miller, for plaintiff, respondent.

GILDERSLEEVE, J.—The judgment directs that the plaintiff recover of the defendants the sum of $12,556.25 damages and interest, and $941.23 costs and extra allowance. It also restrains defendants from maintaining or using their elevated railway in front of plaintiff's premises, unless the defendants shall, within the time and in the manner specified therein, pay to the plaintiff the sum of $12,000, with interest from the date of this judgment, in exchange for a conveyance and release of the property appropriated by the defendants. A fair preponderance of evidence sustains the findings of the court below, and justifies the judgment. There are no exceptions to the admission or exclusion of evidence that are of sufficient importance to require discussion.

The omission of the court below to comply strictly with the letter of section 1023 of the Code of Civil Procedure would not warrant a reversal of this judgment. It will not be denied that, if the court below disregarded defendants' requests, and made no response to any of them, it neglected its duty; and, if the error prejudiced the appellants, the judgment should be reversed (see *In re* Hicks, 14 *N. Y. St. Rep.* 323); but, if such neglect is not prejudicial to the appellants, it is not ground for

reversal (see Uhlenhaut *v.* Railway Co., 18 *N. Y. Supp.* 797).

Section 1023 of the Code provides that "at or before the time when the decision or report is rendered the court or referee must note in the margin of the statement the manner in which each proposition has been disposed of," etc. The court below indorsed upon the defendants' proposed findings of fact and conclusions of law the following ruling: "Each of the within requests is to be marked 'Refused,' except so far as covered by the findings of fact and conclusions of law settled and signed by me." This is not a strict compliance with the requirements of section 1023 of the Code, inasmuch as this ruling was indorsed upon the proposed findings, instead of being noted in the margin of the statement, as required by the statute. The action of the court below did, however, indicate "the manner in which each proposition has been disposed of," but did not note "in the margin of the statement." Hence, although it is not an absolute compliance with the terms of the statute, it is a substantial compliance (see Livingston *v.* Manhattan Railway Co., 17 *N. Y. Supp.* 486); for the purpose of the section is, doubtless, to require the court or referee to pass upon each request, and indicate the manner in which it has been disposed of. In the case at bar each and all of defendants' requests were refused, except so far as they had been covered by the findings settled and signed by the court. This disposes of the requests substantially in accordance with the purpose of the section referred to.

In the case of Livingston *v.* Manhattan Railway Co. (*supra*), the general term of this court held that, "while, therefore, it may be technically the duty of a judge or referee to pass upon such requests, that duty will be fully performed by a specific denial of each and every one of them demanding a fact to be found which either is immaterial or has already been substantially covered

by the findings embodied in the decision or report." And in the case of McCulloch *v.* Dobson (30 *N. E. Rep.* 641) the court of appeals held that the omission of a referee to indicate upon the margin of the paper or otherwise his disposition of certain propositions of fact and law submitted to him, under section 1023 of the Code, is not ground for reversal where "the propositions were nearly all either covered by the findings made by the referee, and stated in his report, or they were immaterial." In any view, we do not think the grounds here urged for reversal are properly before the general term. The better practice in such a case would have been to apply to the court below to have the omission supplied, or mistake, if one, corrected, and, in the event of the request being refused, to have made the application and refusal a part of the record. Such a course would have enabled the court below to supply an omission that might have been the result of oversight or mistake, and would have secured the presentation of a record prepared in accordance with the views of the trial judge. (See McCulloch *v.* Dobson, *supra.*)

We are of opinion that the judgment appealed from should be affirmed, with costs.

DUGRO, J., concurred.

HIGGINS *v.* HOPPOCK.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY CHAMBER; APRIL, 1892.

§ 545.

Pleading—what matter not stricken out of, on motion.

Where it is apparent that by a pleading served by him the defendant in an action intended to plead to the merits by answer, matter contained therein which, if true, constitutes a defense cannot be striken out simply because the pleader says therein that he also demurs on the ground that the complaint does not contain facts sufficient to constitute a cause of action; but *it seems* the defendant may be required to elect between the answer as raising an issue of fact, and a demurrer one of law.

(*Decided April* 28, 1892.)

Motion by plaintiff to strike out of defendant's answer denials contained therein.

The facts appear in the opinion.

Ernest H. Ball, for plaintiff and motion.

William W. Bryan, for defendant, opposed.

PATTERSON, J.—This motion cannot be granted. I can find no authority for striking out from a pleading matter which, if true, constitutes a defense, simply because the pleader has awkwardly said he also demurs on the ground that the complaint does not contain facts sufficient to constitute a cause of action. As this motion

is made, the plaintiff asks the court to coerce the defendant into raising an issue of law when it is quite apparent he intended to plead to the merits by answer. I think the suggestion of a demurrer might be treated as surplusage, and, liberally construing the pleadings, consider that issues of fact are tendered by the answer. The ground of objection to the complaint is one that may be taken at the trial, without a demurrer, and in this case it may be that the defendant merely intended to give notice in his answer that that point would be taken at the trial. It is not artistic pleading, but that does not authorize the striking out of a defense on the merits clearly stated.

If the motion had been to compel the defendant to elect between the answer as raising an issue of fact, and a demurrer one of law, an order might be made, and that was held in Munn *v.* Barnum (12 *Abb. Pr.* 563).

Motion denied, without costs, and without prejudice to a motion to compel the defendant to make his election.

ROTHSCHILD *v.* DITHREDGE FLINT GLASS COMPANY.

CITY COURT OF NEW YORK, CHAMBERS; JANUARY, 1892.

§ 3169, subd. 1.

Attachment—principal office of corporation.

An attachment issued out of the city court of New York against a domestic corporation on the ground that its principal place of business is not within the city and county of New York, will not be vacated merely because its certificate of incorporation states

that its principal place of business is within that city and county, unless it is so in fact. The question whether a corporation has its principal place of business within the city of New York becomes when disputed a question of fact to be determined on the proofs submitted, and the naming by the corporation in its certificate of incorporation of a particular county as that within which its principal office is located, merely estops it from claiming a principal place of business elsewhere until it has changed its place of business in the manner provided by statute.

Blumenthal v. Hudson Boot and Shoe Mfg. Co. (21 *N. Y. Civ. Pro.* 217) distinguished.

(*Decided January* 6, 1892.)

Motion by defendant to vacate an attachment issued against its property.

An attachment was granted in this action on the ground that the defendant, a domestic corporation, did not have its principal office in the city of New York. The defendant moved to vacate it on the ground that by its certificate of incorporation its principal place of business was located in said city and county. It appeared, however, that its business was located at New Brighton, Pa., and that it only nominally had an office here.

Seward, Guthrie & Morawetz, for defendant and motion.

Nathan, Sondheim & Rothschild, for plaintiff, opposed.

McCarthy, J.—This is a motion to vacate an attachment granted against the defendant, a domestic corporation, on the ground that its principal place of business was not in the city of New York (*Code of Civil Procedure*, § 3169). Affidavits have been submitted on both sides, and the matter is before me on the merits.

The defendant contends that having filed its certificate as required by statute, in which it designates as follows: "The said company is to be formed for the purpose of carrying on a part of its business in the town of

New Brighton and county of Beaver and state of Pennsylvania, and that the names of the town and county within this state in which the principal part of the business of said company is to be transacted is the city and county of New York,"—this is all that is necessary, and cites Blumenthal *v.* Hudson B. & S. M. Co. (21 *N. Y. Civ. Pro.*, pp. 217, 220, 221). That case does not support the contention claimed for by the defendant. It determines, however, that a domestic corporation, having once declared by its certificate of incorporation as to the principal place of business, it cannot claim another place as its principal place unless by filing an amended certificate giving notice of such a change in conformity with the statute.

It is not enough to declare in the certificate that a particular place is or will be its principal place of business, but such must be so in fact. It then becomes, when disputed, a question of fact to be determined whether the defendant, a domestic corporation, has its principal place of business within the city of New York.

I have examined the affidavits presented by both sides, and am of the opinion that the defendant's principal place of business is not within the city of New York, and therefore the motion to vacate the attachment should be denied, with $10 costs.

BELL *v.* GOOD.

CITY COURT OF NEW YORK, CHAMBERS; JANUARY, 1892.

§§ 422, 424.

Appearance—obtaining extension of time to plead is—waiver.

The securing by a defendant of an extension of time to answer is a general appearance by him in the action, and waives a defect in the service of the summons.
(*Decided January* 15, 1892).

Motion to set aside judgment taken by default for irregularities in the form and service of the summons.

The summons was served by publication, but it is asserted by the defendant that a copy of the summons and order for service by publication were not mailed to him as required by said order. The defendant through his attorneys applied for and obtained a stipulation from the plaintiff's attorney extending the time to answer, and this is asserted by them to be a waiver of the defect in service.

Carpenter & Hassett, for defendant and motion.

Jeroloman & Arrowsmith, for plaintiff, opposed.

MCCARTHY, J.—The authorities are conflicting on the question as to what constitutes general appearance of an attorney; while the facts here present a very close case, I think the securing of the extension of time to answer by the defendant's attorney was sufficient (see

Krouse *v.* Averill, 4 *Browne's Civ. Pro.* 410; Ratel *v.* Ratel, 17 *Weekly Dig.* 137; Phelps *v.* Phelps, 6 *Browne's Civ. Pro.* 120, affirmed 32 *Hun*, 642). This, then, waived the irregularities complained of.

The motion to vacate is therefore denied; no costs. The defendant may, however, move to open default on the merits in another motion.

RILEY, APPELLANT, *v.* RILEY AND ANOTHER, AS EXECUTORS, ETC., OF ASHBEL W. RILEY, DECEASED, RESPONDENTS.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL TERM; JUNE, 1892.

§ 399.

Limitation to action—delivery of process to sheriff for service.

Where the summons in an action was delivered to the sheriff for service before the statute of limitations had barred an action on the claim, and thereafter, within sixty days after the statute would have barred the claim but for such issuance of the summons, and after the delivery of the summons to the sheriff, but before it was served, or its service by publication commenced, the defendant died,—*Held*, that the action should have been revived and continued against such defendant's executors, and that where that was not done, but instead a new action brought against the executors on the claim, the attempted commencement of the action against their decedent, and the delivery of the summons to the sheriff, did not save the cause of action from the bar of the statute.

Estes v. Wilcox (67 *N. Y.* 264); Adsit v. Butler (87 *Id.* 585); Nail Tradesmen's Bank v. Wetmore (124 *Id.* 248); Palmer v. Ensign (19 *Alb. Law Jour.* 399), followed.

(*Decided June*, 1892).

Appeal by plaintiff from a judgment in favor of defendant rendered at the Monroe county special term.

This action was brought to recover the sum of $2500 paid to the decedent Ashbel W. Riley for the use of the plaintiff on the 31st day of March, 1882; on March 30, 1888, the plaintiff caused a summons in an action about to be brought by her against said Ashbel W. Riley, upon said cause of action, to be issued and delivered to the sheriff of Monroe county for service upon him. An attempt was made by the sheriff to serve said summons on said Ashbel W. Riley at his residence in the city of Rochester in said Monroe county on March 30, but admission was denied the sheriff because of the serious illness of the said Riley, and therefore service was not made. On April 3, 1888, said Riley, died, the summons not having at that time been served upon him, and no order for its publication having been granted, and no publication commenced. On September 24, 1888, plaintiff made a motion at special term in Monroe county to revive the action attempted to be commenced by her against said decedent, against his executors, the defendants in the present action, and that motion was denied, and an order denying it duly entered that no appeal therefrom be taken, and nothing further was done in that proposed action. In October, 1889, the present action was brought to recover upon said claim, and the defense of the statute of limitations was interposed by the defendants. The action was duly tried before, a referee, and the plaintiff's complaint dismissed, and from the judgment thereupon entered this appeal was taken.

Walter S. Hubbell, for plaintiff, appellant.

F. L. & J. E. Durand, for defendants, respondents.

LEWIS, J.—Plaintiff's cause of action accrued when the money was paid for her to her husband, March 31, 1882; and, unless the running of the statute was arrested by the delivery of the summons to the sheriff, the statute had run against the claim before the death of Gen. Riley (Mills *v.* Mills, 115 *N. Y.* 80).

The delivery of the summons to the sheriff was equivalent to the commencement of an action within the provisions of the Code limiting the time for the commencing of actions, and would have arrested the running of the statute had the conditions of section 399 of the Code of Civil Procedure been complied with by the personal service of the summons upon the defendant sought to be charged, or by the first publication of the summons pursuant to an order for service upon him in that manner within 60 days after the expiration of the time limited for the actual commencement of the action. The death of Gen. Riley made a literal compliance with these conditions impossible, and it is the contention of the plaintiff that, because of such impossibility, the delivery of the summons arrested the running of the statute, and that the plaintiff should be excused from a compliance with the conditions.

It is held in Estes *v.* Wilcox (67 *N. Y.* 264), Adsit *v.* Butler (87 *N. Y.* 585), Nail Tradesmen's Bank *v.* Wetmore (124 *N. Y.* 248; 26 *N. E. Rep.* 548), that a compliance with all the provisions of section 399 is indispensable in order to prevent the statute from running against the claim.

The plaintiff evidently took this view of the situation, as is evidenced by her attempt to revive the action against these defendants as executors. When defeated in her motion, she abandoned that proceeding, and afterwards brought a new action directly against the defendant's executors. When Gen. Riley died, the summons was in the hands of the sheriff for service; it had

an actual potential existence. Gen. Riley was the sole defendant named. Section 757 of the Code provides that, in case of the death of a sole defendant, where the cause of action survives, the court must, upon a motion, allow the action to be continued against his representative or successor in interest. Whether it can be held that Gen. Riley was a defendant within the meaning of this section before the service of the summons upon him, may be doubted; but it must be held, we think, that the only means of relief the plaintiff had, if she had any, lay in the continuance of the proceeding to revive the action.

The action in which the attempted service was made must in some manner have been continued to avail the plaintiff anything in arresting the running of the statute. Section 399 expressly provides that, in order to entitle a plaintiff to the benefit of the section, the delivery of the summons to an officer must be followed by the personal service upon the defendant, or by the publication of the summons.

It was held in Clare *v.* Lockard (19 *N. Y. Civ. Pro.* 157) that a substituted service within the 60 days is equivalent to the personal service or publication of the summons within the meaning of section 399.

It was held in the case of Palmer *v.* Ensign, by the superior court of Buffalo (opinion of the court by Judge James M. Smith), that when a defendant dies after the delivery of the summons to the sheriff, and before it is served on the defendant, the action may be continued against his personal representatives. A synopsis of this opinion may be found in 19 *Alb. Law J.* 399. The case in 124 *N. Y.*, *supra*, to which our attention is called by the appellant, is not an authority for the plaintiff. It has no application to an action at law.

We see no way to give the plaintiff relief, and the judgment appealed from should be affirmed.

Dwight, P.J., and Macomber J., concurred.

SICKLES, LATE SHERIFF OF THE CITY AND COUNTY OF NEW YORK RESPONDENT *v.* SULLIVAN, APPELLANT

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; JUNE, 1892.

§ 1405.

Execution—priority of, over claim of receiver.

All the personal property of a judgment debtor not exempt by express provision of law from levy and sale under execution, situate within the jurisdiction of the officer to whom an execution against property is delivered, is bound by the execution from the time of the delivery thereof to the proper officer to be executed; and this lien attaches to the surplus arising upon the sale of property of the judgment debtor pledged to pay a debt owing to a third person, and is not subordinate to the right of a receiver appointed in proceedings supplementary to execution, instituted subsequent to the issuing of the execution held by the sheriff.*

(*Decided June* 29, 1892.)

* In Duffy *v.* Dawson (*ante*, p. 235) it was held that the issuance of an execution against the property does not create a lien on money deposited by the judgment debtor with a third person to provide for the payment of certain possible liabilities; that where the judgment creditor instituted proceedings supplementary to execution for the examination of a third person indebted to the judgment debtor, and procured an order for the payment of said indebtedness to the sheriff, which the third person complied with, he acquires a lien on the moneys so paid, and it should be applied upon his execution notwithstanding the sheriff at the time holds an execution previously issued upon a judgment recovered by another person; and that the lien secured by the commencement of proceedings supplementary to execution followed the fund into the hands of the sheriff.

Appeal by the defendant from a judgment of the special term in New York county rendered in favor of the plaintiff.

The facts are stated in the opinion.

F. R. Kellogg, for defendant, appellant.

D. P. Hayes (*Hayes & Greenbaum*, attorneys), for plaintiff, respondent.

VAN BRUNT, P.J.—In March, 1890, judgments in favor of a large number of people were entered in the office of the clerk of the city and county of New York against Louis Rosenberg and Ismar Baker, and at the same time executions were issued thereon to the sheriff. At the time of the issuing of the said executions there were in the possession of Wilmerding, Morris & Mitchell goods belonging to said Rosenberg & Baker, the judgment debtors, upon which said Wilmerding, Morris & Mitchell claimed a lien for advances. On the 2d of April, 1890, judgment was entered in the office of said clerk in favor of Emil Oelbermann and Louis Domerich against said Rosenberg & Baker, and the judgment duly docketed, and execution issued to the sheriff. On the 11th of April, 1890, the goods in question were sold by Wilmerding, Morris & Mitchell, but not at a regular sheriff's sale; and the balance of the proceeds, after deducting advances, expenses and charges, amounted to $856.01. On the 29th of April, 1890, an order was made in the action of Oelbermann, whose execution was outstanding in the hands of the sheriff, for an examination of the members of the firm of Wilmerding, Morris & Mitchell, and such steps were taken in those proceedings as resulted eventually in the appointment and qualification of this defendant as receiver of the property of the judgment debtors above mentioned. Both the

sheriff and the defendant caused demand to be made upon Wilmerding, Morris & Mitchell for the payment to them, respectively, of the sum representing the equity of Rosenberg & Baker in these goods; and, this demand having been refused, each party to the present action commenced suit against Wilmerding, Morris & Mitchell to recover this fund. A motion having thereupon been made for an order of interpleader, and for permission to deposit the fund with the clerk of the court subject to the future determination of an action between the sheriff and the receiver, such order was granted and substitution duly made. Subsequently the suit came on for trial at the special term, where it was decided that the fund should be awarded to the plaintiff, and judgment was entered accordingly, with costs as against the defendant. From this judgment this appeal is taken.

It is claimed upon the part of the appellant that the defendant, by his appointment as receiver of the assets and effects of Rosenberg & Baker, became entitled to this fund, in the absence of any prior lien attaching thereto on behalf of the sheriff. This is undoubtedly true, and the only question involved is whether a prior lien did not attach in favor of the sheriff by virtue of the execution held by him. The claim that no such lien did attach in favor of the sheriff is urged upon the ground that the only method by which the sheriff, acting under an execution, can acquire a lien upon or interest in the judgment debtor's equity in property pledged to a third person as security for money advanced, is that pointed out in section 1412 of the Code. What that section has to do with the question of lien it is impossible for us to imagine. It relates entirely to the method in which a sale may be had of the interest of the judgment debtor in personal property lawfully pledged. Section 1405 of the Code seems to dispose of the whole question, it appearing that the goods and chattels of a

judgment debtor not exempt by express provision of law from levy and sale by virtue of an execution, and his other personal property which is expressly declared by law to be subject to levy by virtue of an execution, are, when situated within the jurisdiction of the officer to whom an execution against property is delivered, bound by the execution from the time of the delivery thereof to the proper officer to be executed, but not before. Therefore, the interest of the pledgeor in the goods in the hands of Wilmerding, Morris & Mitchell became bound by the executions the moment that they came into the hands of the sheriff, without any levy being made. If Wilmerding, Morris & Mitchell sold the goods and there was a surplus in their hands belonging to the judgment debtor, the executions attached to this surplus in precisely the same manner, and therefore the sheriff was entitled to take it under the executions as so much money. It is difficult to see how, by the appointment of a receiver in aid of an execution, the lien of a prior execution upon the property of the judgment debtor can be overruled. Certainly such a thing would be an anomaly in legal procedure. This being the view which we take of the law relating to the case, we have not thought it necessary to refer to many of the facts which are claimed to be established by the findings of fact; the more particularly so, as many of the findings are absolutely unintelligible.

We think, therefore, that the judgment appealed from should be affirmed, with costs.

PATTERSON, J., concurred.

THOMAS, SUING FOR HIMSELF AS WELL AS FOR ALL OTHERS WHO MAY JOIN, APPELLANT, *v.* THE NEW YORK & GREENWOOD LAKE RAILWAY CO. *et al.*, RESPONDENTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; JANUARY, 1892.

§§ 481, 519.

Pleading—when complaint does not state sufficient facts—rule as to construction.

Where mortgage income bonds issued by a railroad company provided that no more interest should be paid thereon than should be certified by a vote of a majority of the board of directors for the time being to have been earned over and above all expenses, a holder of such bonds cannot maintain an action either at law or in equity to secure the payment of interest on the bonds unless a majority of the directors of the railroad company have previously given a certificate provided for in the bonds themselves or unless such certificate has been unreasonably withheld, and in either case the complaint must allege a request that such certificate be given or refusal to give the same after such request has been made. Accordingly, in such a case, where the only allegation on this subject was as follows: "But that the defendant railway company has, nevertheless, at all times wrongfully neglected and refused to pay said interest, or any part thereof, and the board of directors thereof have wrongfully neglected and refused to certify that said interest, or that any interest whatever, has at any time been earned over and above said expenses; and that the defendants Hewitt and King have at all times participated and aided in such wrongful neglect and refusal." —*Held*, that a demurrer to the complaint on the ground that it did not state a cause of action was properly sustained.

Where in such a case the complaint contains general allegations of the earning of money which should have been appropriated for

the payment of interest; the failure to pay interest; the neglect and refusal of the board of directors to give certificates; the wrongful and improvident incurring of great and unnecessary expenses, which were charged against and paid out of earnings; and then proceeds to specify how such alleged great and unnecessary expenses have been incurred, namely, in rebuilding the railway of the defendant company, and in building new railways and structures, and in improvidently leasing and operating a railroad leased by the defendant railroad, and there are no other specific charges against the defendant, and no allegation that the earnings have been appropriated by the defendants to their own use or that they have intentionally done anything wrong; the complaint even if it did allege a demand of the certificate and refusal to give it would not state a cause of action. The allegation that the defendants did certain things wrongfully and improvidently are conclusions only, and should be disregarded; the allegation that moneys were expended for rebuilding its railway and building new railways and structures is covered by the terms in the bonds providing for the payment of "all expenses, including necessary repairs."

In such case it is the duty of the plaintiff to set forth in his complaint facts upon which the court can determine whether the work alleged to have been done could have been considered "necessary repairs."

Allegations in a complaint that the defendants did certain things "wrongfully," amounts to allegations that they did such things "unlawfully," and are merely allegations of conclusions of law.

Allegations in a complaint that the defendants did certain things "improvidently," and that certain work done by the defendants was not necessary for the maintenance and operation of its railway, are not allegations of fact, but are merely allegations of the opinion of the plaintiff, and are not admitted by a demurrer, but should be disregarded.

A pleading which is defective in that it states conclusions instead of facts is not aided by § 519 of the Code of Civil Procedure providing that a pleading is to be literally construed.

Clark v. Dillon (97 *N. Y.* 373) followed.

(*Decided, June* 29, 1892.)

Appeal by the plaintiff from a final judgment entered upon the trial of an issue of law raised by demurrer and heard by the New York county special term.

The facts are stated in the opinion.

Oliver P. Buell, for plaintiff, appellant.

Cortland Parker and *Charles Steele* (*Buchanan, Steele & Parker, Jr.*, attorneys), for defendants, respondents.

ANDREWS, J.—The complaint alleges that the defendant is a New Jersey corporation; that on November 30, 1878, it issued first mortgage income bonds to the amount of $900,000, and that on the same day it issued second mortgage income bonds to the amount of $1,800,000; that the principal of each of said bonds was payable thirty years after the date thereof, and interest was also payable, at six per cent per annum, on the first days of April and October, out of the earnings of said company; that a large portion of such bonds were sold; that the plaintiff is the owner and holder of five bonds of each class, and that he represents other holders of said first and second mortgage income bonds to the aggregate amount of $425,000; that no interest has ever been paid on any of said bonds; that each of said bonds contained the following proviso: "Provided always, nevertheless, that no more interest shall be payable by virtue hereof than shall be certified by a vote of a majority of the board of directors for the time being to have been by said corporation earned over and above all expenses, including necessary repairs, during the six months ending one month before such time fixed for such half-yearly payments, or theretofore to have accumulated during the current year, so as altogether to make enough to pay at the rate of six per cent per annum, and in default of such certificates no interest shall be payable;" that the defendant railway, for many years past and in each of said years, has earned enough money over and above its operating expenses, including necessary repairs, and including all expenses properly chargeable against or payable out of

gross earnings, to pay said interest in full at the rate of six per cent. per annum on both said classes of bonds; that the defendant railway company has, nevertheless, wrongfully neglected and refused to pay said interest or any part thereof, and the board of directors have wrongfully neglected and refused to certify that said interest or that any interest whatever has at any time been earned over and above said expenses; that said defendant company has, through its directors, wrongfully and improvidently incurred great and unnecessary expenses, which they have wrongfully charged against and paid out of the earnings of said defendant railway company, properly applicable to the payment of interest, and thereby at all times wrongfully prevented the accumulation of a fund to pay said interest; that said directors used and appropriated a large part of said moneys to rebuilding the railway of the defendant company and to building new railway and structures, and that such rebuilding and such building were not necessary for the maintenance and operation of the defendants' railway; that the defendant railway company wrongfully charged the moneys so used and appropriated as expenses against its gross earnings, that the defendant railway company also improvidently leased the railroad known as the Watchung Railroad, and operated said road at a loss, and thereby prevented the accumulation and appropriation of money to pay such interest; that the defendant Hewitt is president and director of the defendant railway, and that the defendant King is president of the Erie Railroad, and a director of the defendant road, and that the defendant road has been leased to the Erie Railroad and operated by it; that said defendants Hewitt and King participated and aided in such wrongful neglect and refusal, and that the same defendants consented to, or procured, moneys expended in the manner aforesaid to be charged as expenses against gross earnings. The complaint demands judgment that the defendants, other than the defendant

trustees, account for all income and earnings of the defendant railway company, and that the defendants, other than the defendant trustees, pay the amount of said net earnings into the hands of a special receiver to be appointed by the court, to be disposed of under the direction of the court for the benefit of the plaintiff and all other *bona-fide* holders of such income bonds.

The defendant Hewitt and the defendant railway company joined in a demurrer to the complaint on various grounds, and among others, that it did not state facts which constituted a cause of action; and the defendant King also demurred separately upon similar grounds. The special term sustained the demurrers, and final judgment was entered dismissing the complaint, with costs, and from that judgment this appeal is taken.

The special term placed its decision upon the ground that if interest was due to the plaintiff upon the bond held by him, he had a cause of action at law against the defendant corporation, but that no relation existed between the plaintiff and the defendants which entitled him to a judgment compelling the defendants to account in a court of equity.

We do not consider it necessary to determine at the present time whether the grounds upon which the special term placed its decision were well founded, because we think the judgment should be sustained upon other grounds.

First. The plaintiff cannot maintain either an action at law or an action in equity, unless a majority of the directors of the defendant railway have previously given the certificate provided for in the bonds themselves, or unless such certificate has been unreasonably withheld: and the complaint in either form of action must allege a request that such certificate be given, and a neglect or refusal to give the same after such a request has been made. The only allegation on this subject contained in the complaint is as follows: "But that the

defendant railway company has, nevertheless, at all times wrongfully neglected and refused to pay said interest or any part thereof, and the board of directors thereof have wrongfully neglected and refused to certify that said interest or that any interest whatever has at any time been earned over and above said expenses. And that the defendants Hewitt and King have at all times participated and aided in such wrongful neglect and refusal." This is not an allegation of a request, and the want of such an allegation renders the complaint demurrable.

Secondly. If the complaint contained a proper allegation of a request for the giving of such certificate, it would not then state a good cause of action against any of the defendants. According to the terms of the proviso contained in each bond, such certificate must be to the effect that the corporation has earned moneys "over and above all expenses, including necessary repairs." The language employed is not "operating" expenses, but "all" expenses.

In determining whether the complaint sets forth a cause of action, it must be taken as a whole. As above stated, it contains general allegations of the earning of money which should have been appropriated for the payment of interest; the failure to pay interest; the neglect and refusal of the board of directors to give the certificate; the wrongful and improvident incurring of great and unnecessary expenses, which were charged against and paid out of earnings; and then proceeds to specify how such alleged great and unnecessary expenses have been incurred, namely: in rebuilding the railway of the defendant company and in building new railway and structures, and in improvidently leasing and operating the Watchung Railway. These are substantially all the specific charges made against the defendants. There is no allegation that the earnings have been appropriated by defendants to their own use, or that they have inten-

tionally done anything wrong. Indeed, one allegation of the complaint, if true, renders it in the highest degree improbable that the defendants, Hewitt or King, should have wrongfully or improvidently used moneys, applicable to the payment of interest, for any other purpose, and that allegation is that a great majority of both said first and second mortgage income bonds are owned or controlled by the defendants, Hewitt and King, or by said firm of Cooper & Hewitt, and by the said Erie Railroad Company. As the two issues of bonds amount to $2,700,000, it is difficult to understand what object Hewitt, or King, or the Erie Railroad could have in expending moneys, applicable to the payment of interest on the bonds, in the improvement of the defendant railroad.

There are several reasons why the allegations in regard to expending the earnings for rebuilding the railway of the defendant company and building new railway and structures, when taken in connection with the rest of the complaint, do not state a good cause of action against the defendants or either of them.

The various allegations that the defendants did certain things "wrongfully" amount to allegations that they did such things "unlawfully," and are merely allegations of conclusions of law.* The allegations that the defendants did certain things "improvidently," and that the rebuilding of the railway of the defendant company and the building new railway and structures were not necessary for the maintenance and operation of the defendant's railway, are not allegations of facts, but are merely allegations of the opinion of the plaintiff; and neither such allegations as to the law, nor as to the

* See, to this effect, People *ex rel.* Egan v. Columbia Club (20 *N. Y. Civ. Pro.* 319), and cases cited in opinion and in the brief of defendant's counsel.

opinion of the plaintiff, are admitted by the demurrer; and if such allegations are disregarded, the remaining portions of the complaint do not state a good cause of action.

Again, the moneys alleged to have been expended for rebuilding the defendant's railway and for building new railway and structures may be considered as covered by the term contained in the proviso inserted in each bond, "all expenses, including necessary repairs." There would be no question on this point if the words "all expenses" stood alone, there being no allegation of bad faith; and, assuming that the words "including necessary repairs" operate as an implied limitation of the scope of the words "all expenses," we still think that, upon these demurrers, the term "all expenses," as so limited, should be regarded as covering the work, which, it is alleged, the defendants have done upon the defendant railway. As in the case of a house or a ship, where a large amount of work is necessarily done to put a railroad—which is old, or was originally badly constructed, or has become very much out of order—into a first-class condition, such work may be, and is, in many cases, with equal propriety and accuracy, termed indifferently "repairing," "rebuilding," or "doing new work." Of this kind of work are the replacing old or worn-out rails, ties, culverts, or bridges with new ones; enlarging insufficient stations and shops; improving the roadbed, and renovating and reconstructing engines and cars according to new and improved models. When a large amount of such work has been done it is a question of the use of terms, and to some extent a matter of opinion, whether it should be called repairing, rebuilding, or doing new work. In common parlance it is frequently said that the work done upon the house or ship or railroad has been so great that it is practically a new house, ship, or railroad; and yet all the repairs made

may have been necessary to put either in a first-class condition.

It was the duty of the plaintiff to set forth in his complaint facts upon which the court could determine whether the work alleged to have been done upon the railway of the defendant company could be considered "necessary repairs." He has not, however, stated any specific facts, but has made general allegations, which are partly merely expressions of opinion, and, so far as they can be regarded as statements of facts, are so vague, indefinite, and uncertain that it is difficult, if not impossible, to determine what they do mean. There is no allegation as to how much of the defendant company's railway has been rebuilt, nor how much new railway, or how many new structures have been built, and the allegations in regard to the rebuilding of the railway of the defendant company and in regard to building new railway and structures might be true, although the actual rebuilding and building, as distinguished from "necessary repairs," were of the most trifling and insignificant amount.

These features of the complaint are not aided by section 519 of the Code. In Clark *v.* Dillon (97 *N. Y.* 373), RUGER, Ch.J., delivering the opinion of the court, said: "It was formerly the settled rule to construe doubtful pleadings most strongly against the pleader, but this rule has been so far modified by the Code as now to require them to be liberally construed, with a view to substantial justice between the parties. This modification has, however, been held to extend only to matters of form, and not to apply to the fundamental requisites of the cause of action" (citing authorities).

"A construction of doubtful or uncertain allegations in a pleading which enables a party by thus pleading to throw upon his adversary the hazard of correctly interpreting their meaning is no more allowable now than formerly; and when a pleading is susceptible of two

meanings, that shall be taken which is most unfavorable to the pleader" (citing authorities).

"It is in the nature of things that a party who is required to frame his issues for the information of his adversary and the court must be responsible for any failure to express his meaning clearly and unmistakably. While it is competent for a party to move to make the pleadings of his adversary more definite and certain, yet, inasmuch as it is the primary duty of the party pleading to present a clear and unequivocal statement of his allegations, the onus of having them made so cannot be cast upon his adversary by his own fault in failing to perform his duty."

We think that, applying the rule thus laid down, the allegations of the complaint as to the rebuilding of the defendant's railway, and the building of new railway and structures, taken in connection with the other allegations of the complaint, do not state a good cause of action against either of the defendants, because upon these demurrers they cannot be considered as sufficient allegations that the money expended for those purposes was not covered by the term "all expenses, including necessary repairs," contained in the proviso inserted in each bond.

So far as the leasing of the Watchung Railroad, and the operating the same, are concerned, the allegations of the complaint in effect amount to a charge that the board of directors acted improvidently in making such lease, and in operating that road at a loss. It is sufficient to say that the question whether such lease should be made, and upon what terms, and whether the road should be operated, was devolved by law upon the board of directors of the defendant railway; and as there is no allegation that they acted in bad faith, or exceeded their powers, in this respect, the alleged improvidence in making the lease, and operating the road, does not, in connection with the other allegations of the complaint,

constitute a good cause of action against either of the defendants.

The judgment should be affirmed, with costs.

VAN BRUNT, P.J., and O'BRIEN, J., concurred.

ADLER *v.* ORDER OF AMERICAN FRATERNAL CIRCLE OF BALTIMORE CITY.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY SPECIAL TERM; MAY, 1892.

§§ 635 *et seq.*, 1780.

Attachment—what must be shown in action against foreign corporation.

The affidavits upon which an attachment is granted against the property of a foreign corporation must show that the court has jurisdiction over the subject-matter, and that a cause of action exists in favor of the plaintiff and against the defendant, by alleging either that the plaintiff is a resident of this state, or that the action is brought to recover damages for the breach of a contract made within this state, or that the cause of action arose within this state; and unless it does so, there is no jurisdiction in the court or judge to grant an attachment; the omission is jurisdictional, and cannot be cured by an amendment.

(*Decided May*, 1892.)

Motion by the defendant to vacate an attachment issued against its property.

This action was brought by the plaintiff against the defendant, a corporation organized under the laws of the state of Maryland, to recover the sum of $200, being a

benefit to which the plaintiff alleges she, as a member of the defendant's society or corporation, became entitled under its constitution and by-laws because she was during eight weeks, between November 15, 1891, and January 15, 1892, sick.

Upon an affidavit setting forth these facts an attachment was issued against the property of the defendant after the summons in the action had been served upon it, and the defendant moved to vacate said attachment upon the papers on which said attachment was granted, on the ground that it did not appear therefrom that the cause of action arose within this state or that the plaintiff resided within this state.

Gruber & Landon, for defendant and motion.

Samuel F. Hyman (*Hyman & Heinzleman*, attorneys), for plaintiff, opposed.

INGRAHAM, J.—In an action of this character, by section 1780 of the Code, this court has jurisdiction in an action against a foreign corporation only when it appears that the plaintiff is a resident of this state, or where it appears that the action is brought to recover damages for breach of a contract made within this state, or where the cause of action arose within the state.

To give the court jurisdiction to grant an attachment it must appear by affidavit that a cause of action exists in favor of plaintiff against defendant, and the general term of this court has held that, unless the facts appear in the affidavit that give the court jurisdiction of the subject-matter of the action, the judge has no jurisdiction to grant the attachment (Oliver *v.* Heyward Chair M'f'g Co., 10 *N. Y. Supp.* 771; s. c., 32 *St. Rep.* 542).

This is distinct from the court acquiring jurisdiction over the person of the defendant. Unless the facts

appear to bring the case within section 1780 of the Code, the court has no jurisdiction over the subject-matter, and there is, therefore, no cause of action alleged. This is jurisdictional, and cannot be cured by amendments.

The motion must, therefore, be granted, and the attachment vacated; $10 costs to abide the event.

BECKLEY, APPELLANT, *v.* CHAMBERLAIN, RESPONDENT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; JUNE, 1892.

§§ 523, 529.

Verification of pleading—when, cannot be omitted in action for deceit and false representations.

In an action to recover damages for deceit and false representations in the sale of stock the defendant's answer must be verified.

The provision of section 523 of the Code of Civil Procedure that the verification of a pleading may be omitted "in a case where it is not otherwise specially prescribed by law, where the party verifying would be privileged from testifying as a witness concerning an allegation or denial contained in a pleading, is limited by section 529 of the Code, under which a defendant is not excused from verifying his answer, not only in actions relating to confessed judgments, fraudulent conveyances and actions affecting specific property," but also where the complaint charges him "with any fraud whatsoever affecting the right or property of another." In construing section 529 it should not be limited simply to fraudulent transfers of property, but effect must be given to every provision of it.

Frist *v.* Climm (6 *N. Y. Civ. Pro.* 30) questioned and not followed.

(*Decided June*, 1892.)

Appeal by the defendant from an order of the New York county special term denying a motion to compel the plaintiff to receive an unverified answer.

This action was commenced April 7, 1892, to recover the sum of $1000 with interest from April 27, 1886, damages alleged to have been sustained by the plaintiff by the purchase of fifty shares of stock of New Jersey Coal Saving Company, which the plaintiff alleges he was induced to make by the false and fraudulent representations of the defendant.

The complaint alleges that on or about April 25 and 27, 1886, defendant represented to plaintiff that a corporation known as the New Jersey Coal Saving Company had been duly organized under the laws of the state of New Jersey for the purpose of manufacturing, selling and leasing appliances for economizing fuel under a right or license purchased by it of the Ham Coal Saving Company of the city of New York, which gave to said New Jersey Coal Saving Company the exclusive right to use in the state of New Jersey a certain patent owned by said Ham Coal Saving Company; that the capital stock of said company was $150,000, divided into 1500 shares of $100 each, all of which had been issued and taken at $20 per share, except 500 shares thereof, which still remained in the treasury of the company; that the trustees of the company had paid into its treasury $20,000 in cash, and after paying said Ham Coal Saving Company for said right or license there remained a sufficient amount in cash in its treasury to do business with successfully and that such business promised to be exceedingly remunerative; that the defendant also represented to plaintiff that he desired plaintiff to become interested in said corporation and a stockholder thereof, because he could be useful to the company, and offered him fifty shares of said capital stock at $20 per share; that the plaintiff, trusting in said representations and

believing them to be true, purchased on April 27, 1886, fifty shares of the stock of the New Jersey Coal Saving Company, and paid the defendant therefor $1000; that said representations were false and fraudulent and were intended to and did deceive and defraud the plaintiff; that thereby he wholly lost said $1000; that the company had not been organized as represented, and $20,000 had not been paid into its treasury, and there did not remain sufficient money in its treasury to carry on its business successfully, and its business did not promise to be remunerative, and the defendant so knew; that it was represented by defendant to plaintiff that the stock purchased by plaintiff was the stock reserved for the company, that his money would go into the treasury of the company, but the stock so sold him was the stock of the defendant and not of the company; and that the stock of said company is entirely worthless.

The defendant served an answer to this complaint, denying each and every allegation thereof, but failed to verify it, and it was returned on that ground, whereupon the defendant moved that such service be confirmed, claiming that it was not necessary for him to verify his answer because the cause of action was founded upon fraud and false representations.

The motion was heard before Mr. Justice INGRAHAM in May, 1892, and he denied it, filing a memorandum reading as follows: "Answer in this case must be verified under section 529 of the Code. Motion denied, with $10 costs to abide the event."

The defendant thereupon took this appeal.

James B. Dill (*Dill, Chandler & Seymour*, attorneys), for defendant, appellant.

L. R. Beckley, for plaintiff, respondent.

PER CURIAM (VAN BRUNT, P.J., O'BRIEN and PATTERSON,

JJ.).—The complaint in this action shows that it is brought to recover the consideration paid for certain shares of stock sold by the defendant to the plaintiff, which it was alleged the plaintiff was induced to purchase by reason of certain false and fraudulent representations, which are fully set forth in the complaint. The defendant served thereto an unverified answer, which was returned with a notice that it did not comply with the provisions of the Code of Civil Procedure, sections 523 and 529, which refer to the verification of a pleading. A motion subsequently made by the defendant to compel plaintiff to receive the unverified answer was denied, upon the ground that the answer to be served must be verified under section 529 of the Code.

We have been referred by the appellants to the case of Frist *v.* Climm (6 *Civ. Pro. Rep.* 30), as directly applying to the question here presented, and in which it was held that the defendant had the right in such a case to serve an unverified answer. We cannot, however, after an examination of sections 523 and 529 of the Code, agree with the conclusion reached in that case. The former section (523) provides when a pleading must be verified; and in regard to when such verification may be omitted, thus states the rule: "In a case where it is not otherwise specially prescribed by law, where the party pleading would be privileged from testifying as a witness concerning an allegation or denial contained in the pleading."

This section contains the general rule, and was undoubtedly intended as extending the privilege to parties of omitting to verify their pleading in cases where the same would have a tendency to expose them to a penal liability or to a criminal charge. But it will be noticed that an exception has been made with respect to cases wherein a verification "is otherwise specially prescribed by law." Such an exception to the general rule thus laid down by section 523 is to be found in the cases re-

ferred to in section 529, wherein the defendant is not excused from verifying his answer. In addition to actions relating to confessed judgments, fraudulent conveyances, and actions affecting specific property, the last paragraph of section 529 states that a defendant is not excused from verifying his answer to a complaint charging him "with any fraud whatever affecting a right or the property of another." This paragraph, being disjunctive, is not related necessarily with the cases enumerated in the preceding paragraphs of the section, and its language is general, applying to any case of fraud whatever affecting a right or the property of another. So far, therefore, as an exemption is provided by section 523 in cases of fraud, section 529 must be regarded as qualifying, and as constituting the exception which is otherwise specially prescribed for, depriving a defendant of the privilege extended by that section of not being compelled in certain actions to verify his answer.

We think that the purpose of this section 529 was to meet a case like the present, which, were it not for this provision of law, would enable a defendant, in a case based upon his fraudulent acts, to serve an unverified answer. We do not think, therefore, as said in Frist *v.* Climm (*supra*), that section 529 is limited simply to fraudulent transfers of property; but, on the contrary, that effect must be given to every provision of that section; and it will be entirely meaningless in its last sentence unless the interpretation now put upon it is given to the words, "or with any fraud whatever affecting a right or the property of another." And we are, also, of the opinion that this construction given to section 529 does not entirely destroy the privilege provided for by section 523, but that, so far as section 523 extends the privilege of serving an unverified answer to cases where the party pleading would be privileged from testifying as a witness concerning an allegation contained in a pleading, such privilege was expressly taken away in ac-

tions of fraud. This would still leave the privilege provided for by section 523 to extend to all cases covered by such section excepting those which are otherwise specially provided for by section 529, which, as we have seen, covers a case such as the present, which is an action for deceit for false representations in the sale of stock.

We are of opinion, therefore, that the order appealed from should be affirmed, with $10 costs and disbursements.

SAWYER *v.* BENNETT *et al.*

SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM; JUNE, 1892.

§§ 494, 508.

Pleading—in action for libel, plea of justification is new matter—when such defense insufficient.

In an action for libel a defense setting up the truth of the publication is new matter, and may be demurred to on the ground that it is insufficient in law upon the face thereof.

In an action for libel an answer pleading in justification the truth of certain parts of the publication alleged to be libelous is insufficient where such justification is not pleaded specifically as a partial defense or in mitigation of damages; to be a complete defense the justification should be as broad as the charge, and of the very charge attempted to be justified.

(*Decided June*, 1892.)

Demurrer by the plaintiff to new matter pleaded in the defendant's answer in justification of an alleged libel set forth in the complaint.

The facts appear in the opinion.

Eugene Frayer (*Warner & Frayer*, attorneys), for plaintiff and demurrer.

John Townshend, for defendants, opposed.

BEACH, J.—The action is for libel. The answer, by its second and third defenses, pleads in justification the truth of certain portions of the articles alleged to be libelous. The plaintiff demurs upon the ground that the defenses are insufficient in law upon the face thereof. It is provided by section 494, Code of Civil Procedure, that plaintiff may demur to a defense consisting of new matter contained in the answer, on the ground above specified. The objection that the plaintiff has mistaken the remedy cannot be sustained. The plea of truth in defense is new matter within the statute meaning. The reason is that it is wholly outside and distinct from the alleged cause of action, and must be affirmatively pleaded by the defendant, and so proven upon the trial.

I am of opinion, too, that the demurrer is well taken. The justification fails as a complete defense, because it relates but to parts of the publication alleged libelous. It must be so weighed, not being pleaded specifically as a partial defense or in mitigation of damages (Thompson *v.* Halbert, 109 *N. Y.* 329). That the justification as pleaded is not a complete defense is hardly debatable. To be so, the justification must be as broad as the charge, and of the very charge attempted to be justified *Townsh. Sland. & L.* (3d Ed) § 212, and cases there cited Skinner *v.* Powers, 1 *Wend.* 451; Fero *v.* Ruscoe, 4 *N. Y.* 162.

The averments of verity in the defense will be found, upon examination, limited to specified facts contained in the publication, the libelous character whereof may

be seriously questioned. The other charges against the plaintiff are omitted. That the justification falls far short of the charges seems apparent.

Judgment ordered for plaintiff on demurrer to answer, with costs. Leave to amend on payment of costs.

DOUGLASS *v.* MEYER.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL TERM; APRIL, 1892.

§ 870 *et seq.*

Examination of party before trial—when order for, properly granted.

In an action to recover damages for personal injuries caused by being struck by an elevator lift, where the answer was a general denial, and the plaintiff by affidavit shows that at the time of the accident before he was taken home he was attended by a physician in the store of the defendant into which he was carried after the accident,—*Held*, that an order was properly made for the examination of the defendant before trial to enable the plaintiff to ascertain the name of such physician, the names of those who witnessed the accident and of the servants of the defendant who operated the lift at the time of the accident, and whether or not defendant owned the lift at the time of the accident—all of which facts plaintiff alleged he was ignorant of, but were within defendant's knowledge.

The power of the court to vacate an order for the examination of a party before trial is unquestioned, but its exercise discretionary.

Chapin v. Thomson (16 *Hun*, 53); Beach v. Mayor (14 *Id.* 272) distinguished.

(*Decided April* 25, 1892.)

Motion by defendant that an order for his examination as a party before trial be vacated.

The facts appear in the opinion.

GILDERSLEEVE, J.—This is a motion to vacate an order for the examination of defendant before trial.

The plaintiff was struck by an elevator lift while passing in front of 73 Warren street, and rendered unconscious. He brought this action against the defendant, as the owner of the lift, for damages on account of such injury. The answer denies that the defendant has any knowledge or information sufficient to form a belief as to most of the allegations of the complaint, and denies the rest on information and belief. The plaintiff, at the time of the accident, and before he was taken home, was attended by a physician in the store of the defendant, where he was carried immediately after the accident.

Plaintiff desires to ascertain by the examination of defendant before trial the name of this physician, and the names of those who witnessed the accident, and the names of the servants of defendant who were operating the lift at the time of the accident (none of which names are known to plaintiff, but, as plaintiff alleges, are within the knowledge of defendant), as the evidence of those people will be necessary to plaintiff on the trial.

Plaintiff desires also to ascertain from defendant whether or not defendant was the owner of the life at the time of the accident.

The affidavit, upon which the order was granted, is sufficient as to form (*Code. Civ. Pro.* § 872), and the undisputed allegations warrant the granting of the order.

It appears that the examination is material and neces-

sary; that the application is not one for the purpose of extracting evidence from defendant by unnecessary procedure, and its good faith cannot be seriously questioned. It, therefore, seems that in the furtherance of justice the examination should be directed (Hardy *v.* Peters, 30 *Hun*, 79).

The power of the court to vacate the order is not questioned (Jenkins *v.* Putnam, 106 *N. Y.* 272); but that power is discretionary, and I do not think this is a proper case in which to exercise it.

The case of Chapin *v.* Thomson (16 *Hun*, 53), cited by the learned counsel for the defendant, is not in point; for the opinion in that case, after reciting the fact that the court is not bound, under sec. 873 of the Code, to grant the order in every case where the application is formally correct (see also on this point, Jenkins *v.* Putnam, 106 *N. Y.* 272), held that an order will not be granted where the applicant only seeks to find out what the opposite party will swear to, so as to enable him to prepare to meet and overcome it. That is not the case at bar, for here the plaintiff desires merely to learn the names of those who saw the accident, in order to call them as witnesses on the trial; and also he desires to know if the defendant is the owner of the lift, as in his answer the defendant seems to leave this in doubt.

Nor does the case of Beach *v.* The Mayor (14 *Hun*, 79), urged by defendant's counsel, apply to this case; for there the affidavits failed to state that the testimony sought was material and necessary for the party making the application; whereas here there is no such defect in the affidavit.

Motion to vacate the order denied, without costs.

THOMPSON *v.* STANLEY.

SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM; AUGUST, 1892.

§ 497.

Pleading over after demurrer—what costs taxable and to be inserted in interlocutory judgment.

Where a demurrer to a complaint is overruled, with leave to the defendant to answer over on payment of costs, the costs taxable in favor of the defendant, and which may be inserted in the interlocutory judgment, are the costs which by the operation of the provision allowing the amendment will be vacated, and do not include costs before notice of trial and the expenses of entering, docketing and satisfying final judgment and sheriff's fees thereon.

(*Decided August* 15, 1892.)

Motion by the defendant for a new taxation of costs.

Defendant demurred to plaintiff's complaint, and his demurrer was overruled, with leave to answer over on payment of costs. Plaintiff presented to the clerk a bill of costs containing the following items:

Costs before notice of trial	$25 00
Costs after notice of trial	15 00
Trial fee, issue of law	20 00
Clerk's fee on entering judgment	50
Affidavits and acknowledgments	25
Serving copies of summons and complaint on defendant	2 00
Satisfaction piece	12

Transcript and filing	12
Certified copy judgment	12
Certified copies of motion to strike out [*sic.*]	10
Postage	10
Sheriff's fees on execution	1 75
Total	$65 06

Of these the clerk disallowed the following:

Costs before notice of trial	$25 00
Fee on entering judgment	50
Satisfaction piece	12
Transcript and filing	12
Sheriff's fee on execution	1 75
Total	$27 49

and allowed the other items, amounting in the aggregate to $37.57.

The plaintiff's attorney excepted to the refusal of the clerk to tax the items disallowed, and made this motion.

L. Kargé for plaintiff and motion.

Frederick Seymour (*Dill, Chandler & Seymour*, attorneys), for defendant, opposed.

This motion is opposed on the ground laid down by Justice HARRIS in the case of Van Valkenburgh *v.* Van Schaick, in which he says: "The general practice in all cases where an amendment is allowed upon payment of costs is, that the party paying such costs shall be charged with the costs of all proceedings which by the operation of the order authorizing the amendment will be vacated. Thus, if upon the trial a plaintiff is permitted to amend his complaint in a material matter, so that a new answer is required, he would be charged with the costs of the former answer, which as the effect of the rule would be vacated. In other words, he would

PATTERSON, J.—The question arising on this record is presented for determination on an agreed statement, submitted under section 1279 of the Code of Civil Procedure. It appears that on the 22d day of December, 1883, one Pohalski recovered a judgment against the defendant in the district court of Colorado for the county of Arapahoe, that being a court of record, for the sum of $1761.20, on which judgment execution was issued within one year from the entry thereof, which execution was returned unsatisfied. The judgment was subsequently assigned to the plaintiff. The defendant is now, and for upwards of seven years last past has been, a resident and citizen of the state of New York, but when he became such, or whether he was such at the date of the entry of the judgment, is not stated, nor does it appear that the plaintiff is a resident of this state.

The question submitted for decision is: Does the statute of limitations of the state of Colorado prevent a recovery in an action on the judgment in this state?

By statutes of Colorado, enacted in the year 1891, it is provided concerning the limitation of time within which actions may be brought in the courts of that state as follows: "Section 2900 The following actions shall be commenced within six years next after the cause of action shall accrue and not afterwards: First. All actions of debt founded upon any contract or liability in action. Second. All actions founded upon judgments rendered in any court not being a court of record. Third. All actions for arrears of rent. Fourth. All actions of assumpsit or on the case founded on any contract or liability express or implied. Fifth. All actions for waste and trespass upon land. Sixth. All actions of replevin and all other actions for taking, detaining or injuring goods and chattels. Seventh. All actions on the case except for slanderous words and for libels." It is further provided by section 2529 of the said statutes,

in substance, that all the goods, chattels and real estate of any person against whom a judgment shall be obtained in any court of record, either at law or in equity, for any debt, damages or costs, shall be liable to be sold on execution, and the judgment shall be a lien on real estate for seven years from the last day of the term of the court in which the judgment is rendered; provided, however, that execution be issued within a year after the entry of the judgment, "and after the said seven years the same shall cease to be a lien on any real estate as against *bona fide* purchasers or subsequent incumbrances by mortgage, judgment or otherwise." There is printed in the record a provision of an act of 1883 which limits the duration of the judgment lien to six years, but that was changed to seven years by the act of 1891. It is also provided by the laws of the state of Colorado that a judgment recovered in a civil action may be revived by filing a petition in which shall be alleged the time the judgment was recovered, that it remains unsatisfied in whole or in part, and stating the amount the judgment should be revived for and verifying it as complaints in actions are verified. Upon filing such a petition an order to show cause is issued, upon the return of which the defendant may appear and answer as in an action, "and the court shall try and determine any issue so formed the same as any issues made by pleadings are required to be tried and decided, and hear any evidence necessary to decide the matter." It is further provided that if the court decide to revive the judgment an order to that effect shall be made and attached to the original files in the cause, an entry thereof made in the judgment docket and book, "and if the petition is filed before the liens created by the original judgment have expired and the transcript of the entry is filed, etc., all rights under such judgment shall continue, and execution may issue on such revived judgment the same as on the original judgment."

It is set forth in the agreed statement that no further or other laws of Colorado have been found bearing on the question submitted, and no judicial decisions of the tribunals of that state have been cited or referred to.

It is claimed by the defendant that, under the provisions of the laws of Colorado above referred to, "the judgment is dead, barred and non-enforcible," and cannot form the basis of an action either in that jurisdiction or this. That an action, as distinguished from the proceeding for revival by *scire facias*, would not lie upon it in Colorado is plain, and results from the first clause of section 2900 above quoted. Although judgments of courts of record are not mentioned in terms, yet actions of debt are barred in six years. In these statutes the several kinds of actions coming within their operation are referred to by their common-law designation, and under common-law pleading debt was the appropriate form of action on a judgment (Andrews *v.* Montgomery, 19 *Johns.* 165, citing 1 *Chitty*, 94, etc.), the cause of action being one arising on a record. The effect of the six years' bar is not, however, that contended for by the defendant. Although an action cannot be maintained on the judgment after six years, yet the lien by express provision continues one year longer, and the judgment may be revived, not necessarily within six or seven years, but if within the longer period certain rights are preserved to the judgment creditor. It is not true, therefore, that at the end of six years the judgment is a nullity, and all rights under it terminated; but the duration of the lien is not important in this case, as the legislation extending the term from six to ten years was after the expiration of the lien of this judgment.

But it is urged by the defendant that whatever pleas would be good to an action on the judgment if brought in Colorado would be equally available to defeat an action on it brought here; but, as was held in McElmoyle *v.* Cohen (13 *Peters*, 312), the plea of the statute

of limitations to an action founded upon a judgment of another state goes to the remedy only and the *lex fori* prevails, and such is the settled law of this state.

In Miller *v.* Benham (68 *N. Y.* 83), suit was brought on a California judgment. The five years' bar of the statute of limitations of that state was set up as a defense. The court said: "It is well settled in this state that a plea of the statute of limitations of the state or country where the contract is made is no bar to a suit brought in a foreign tribunal and the *lex fori* governs all questions under that statute" (Lincoln *v.* Battelle, 6 *Wend.* 475; Ruggles *v.* Keeler, 3 *Johns.* 263; Power *v.* Hathaway, 43 *Barb.* 214; Finlandson *v.* Lachenmeyer, 37 *How.* 145).

As is said in Scudder *v.* Union Nat. Bank (1 *Otto*, 406): "Matters respecting the remedy, such as bringing suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought."

It is true that in these New York cases the actions were brought against non-residents, and that so far as concerns that class of defendants the rule is now changed by positive legislation. By section 390, Code Civ. Pro., it is provided that where a cause of action not involving title to or possession of realty within this state accrues against a person then not a resident, an action thereon cannot be maintained against him or his personal representatives after the expiration of the time limited by the laws of his residence, except by a resident of the state and in a case where the cause of action originally accrued in favor of a resident, or where before the time so limited the person in whose favor the cause of action accrued was or became a resident, or assigned the cause of action to a resident who continuously thereafter owned the same.

This provision of the Code does not alter the general rule. It merely relates to actions against non-residents

upon claims barred by the law of the states in which they reside and has no application here. It does not appear in the agreed statement that the conditions as to residence of either of the parties or of the plaintiff's assignor are or were such as to bring the case within section 390 of the Code of Civil Procedure, and we are not at liberty to draw any inferences of fact whatever (Fearing *v.* Irwin, 55 *N. Y.*, 486).

The plaintiff is entitled to judgment for $1761.20 and interest from December 22, 1883, and costs to be taxed.

VAN BRUNT, P. J., and O'BRIEN, J., concurred.

BELL, RESPONDENT, *v.* GOOD, APPELLANT.

CITY COURT OF NEW YORK, GENERAL TERM; JUNE, 1892.

§§ 421, 424, 3165.

Appearance—when obtaining extension of time to plead is not—Time to answer summons served without the state.

Where a summons served without the state or by publication requires the defendant to answer the same within six days, the court does not acquire jurisdiction of defendant by the personal service thereof upon the defendant without the state.

It seems in such a case a voluntary appearance of the defendant would cure the irregularity in the service of the summons and confer jurisdiction.

The mere obtaining of an extension of time to answer is not a sufficient appearance on the part of the defendant in an action, to

operate as waiver of the irregularities in the service of a summons and confer jurisdiction.

Bell *v.* Good (22 *N. Y. Civ. Pro.* 316) reversed.

(*Decided June*, 1892.)

Appeal from an order resettling an order denying defendant's motion to vacate a judgment entered herein and setting aside the service of summons.

The facts are stated in the opinion.

Carpenter & Hassett, for defendant, appellant.

Jeroloman & Arrowsmith, for plaintiff, respondent.

McGOWN, J.—Upon an affidavit made by one of plaintiff's attorneys, setting forth, among other things, that the defendant is a non-resident of the state, that he resided in the state of Connecticut, and upon the complaint herein an order was made on September 2, 1891, that the "service of the summons herein be made by publication . . . or at the option of the plaintiff, by service of the summons and a copy of the complaint and of this order, without the state, upon said defendant personally; and that on or before the day of the first publication the plaintiff deposit at the post-office, in the city and county of New York, a set of copies of the summons and complaint herein, and of the order, in a securely closed post-paid wrapper, directed to said defendant at Roxbury, Conn., his last-known place of residence." The summons referred to bears date April 17, 1891, and directed the defendant to answer the complaint, and to serve a copy of his answer on plaintiff's attorneys within six days after the service thereof, etc.

The action was brought, as stated in the complaint, to recover the amount of two checks, drawn by defendant upon the Importers' and Traders' Bank. Service of the summons, complaint, affidavit and order of publica-

tion and notice was made on the 9th day of September, 1891, in the state of Connecticut, on the defendant personally.

An affidavit made by John Jeroloman, one of the plaintiff's attorneys, on the 14th of December, 1891, states "that no answer, demurrer or notice of appearance has been received or served in pursuance of the requirements of the summons in said action, except to appear herein by attorney, on November 12, 1891, and obtain twenty days' further time to answer; but that said defendant has not answered within said extended time and is in default herein, etc.; and on December 15, 1891, a judgment was entered by plaintiff's attorneys against said defendant for the sum of $434.78, amount claimed, interest and costs.

On December 23, 1891, an order was granted by one of the justices of this court, directing plaintiff to show cause, on December 28, 1891, why the service of the summons herein and judgment entered December 15, 1891, should not be set aside upon the ground, among others, of irregularity in the form and service of the summons, etc., and an order was entered on or about January 18, 1892, whereby it was "ordered that said motion be, and the same hereby is, denied, with leave to defendant to move to open default on the merits in another motion, if he so desires."

On January 25, 1892, an order was granted requiring plaintiff to show cause on January 28, 1892, why the order entered on January 18, 1892, should not be vacated or resettled, or why a reargument should not be granted, etc. And on January 19, an order was made as follows: "Ordered, that the order entered herein on or about January 18, 1892, be resettled by the entry of this order, and that said motion to vacate the judgment entered herein be, and the same hereby is, denied, with leave to the defendant to move to open the default on

the merits in another motion, if he desires," and it is from this order that the defendant appeals.

Section 3165, subdivision 2 of Code of Civil Procedure, provides that " when an order directing service of the summons without the city of New York, or by publication, is granted, the summons must state that the time within which the defendant must serve a copy of his answer is ten days after service thereof, exclusive of the day of service." And further provides: "If the summons, requiring the defendant to answer within a shorter time, has been issued . . . before an order specified in this subdivision is granted, the justice granting such an order may direct that the summons be amended accordingly, and thereupon the summons published or served without that city, pursuant to the order, must correctly state the time."

The summons served herein required the defendant to serve his answer within six days. No direction was made by the justice granting the order that the summons be amended, and the same was not amended as required by subdivision 2 of section 3165, above cited. The court, for this reason, therefore, never acquired jurisdiction of the defendant.

No motion has been made to amend the summons, nor could such amendment be made if such motion should be made and granted now, as the court did not acquire jurisdiction by the service of the six days' summons.

Where an attachment or other provisional remedy is granted, as provided by section 416 of the Code, the court acquires jurisdiction from the time of the granting of the attachment, and has control of all subsequent proceedings. In this case it does not appear from the case on appeal that an attachment or other provisional remedy was applied for or granted.

Section 3165 of the Code, forming part of art. 2, title 1, of chap. 20, entitled "The Marine Court of the

City of New York" (name changed to City Court, Laws 1883, chap. 26), provides that: "The summons, in an action brought in the court, must state that the time within which the defendant must serve a copy of his answer is six days after the service thereof . . . except in one of the following cases: Subd. 2. Where an order, directing service of the summons without the city of New York, or by publication, is granted, the summons must state that the time within which the defendant must serve a copy of his answer is ten days, etc." Section 3169 provides for the issuing of a warrant of attachment against property where the defendant is not a resident of the state. Section 3170 provides that: "An order directing the service of a summons, either without the city of New York, or by publication, may be granted by the court or by a justice thereof, but only in a case where a warrant of attachment has been issued, as prescribed in the last section, and personal service of the summons cannot be made, with due diligence, within that city, etc." (See Kivert *v.* Von Bula, 1 *City Court Reports*, 243; Gibbon *v.* Freel, 65 *How. Prac. R.* 273).

A voluntary appearance of the defendant herein, however, would cure the irregularities in the service of the summons and confer jurisdiction.

It is claimed by the plaintiff that there was an appearance herein by the defendant. Section 421 of the Code provides that: "The defendant's appearance must be made by serving upon the plaintiff's attorney . . . a notice of appearance, or a copy of a demurrer or of an answer. A notice or pleading, so served, must be subscribed by the defendant's attorney, who must add to his signature his office address, etc."

It is not claimed that any such notice of appearance was served herein. Plaintiff's attorney, Jeroloman, swears "that on the first day of November, 1891, a person from the defendant's attorney's office obtained twenty days' further time to answer, and at the expira-

tion of said twenty days an application for further time to answer was made by a clerk from defendant's attorney's office, and he was told by deponent to file his answer. His excuse for asking time was on account of the absence of Mr. Carpenter, the defendant's attorney; that the defendant's attorney has a paper extending defendant's time to answer twenty days from November 12, 1891."

Freeman, a clerk in the office of Jeroloman & Arrowsmith, plaintiff's attorneys, swears "that he remembers the time the young man called from the office of Carpenter & Hassett, the attorneys for the defendant herein, and wanted to obtain further time in which to answer the complaint . . . that he well knows the said young man, whose name is George Eckhard . . . and knows that he was then employed by the said defendant's attorneys, Carpenter & Hassett."

The affidavits on the part of the defendant allege, in substance, that defendant never appeared in the action, and that George Eckhard, above referred to, was not authorized to appear for the defendant.

Philip Carpenter swears that: "I am one of the attorneys for the defendant in making this motion. No notice of appearance of the defendant in this action was served. Nor did I, nor did the firm of Carpenter & Hassett, or any other attorney, to my knowledge, appear for him in the action, nor was any one in our office authorized to appear for the defendant in any way. I never asked plaintiff's attorneys for any extension of time to answer, nor authorized any such request."

It appears, however, uncontradicted, that an extension of time for twenty days was given to defendant to answer, and that he received the benefit of it.

Conceding that defendant's attorneys obtained an extension of time for defendant to answer, as alleged in plaintiff's affidavits, after a careful examination of all the authorities referred to and cited in the briefs submitted

by the attorneys for the plaintiffs and defendant, in the absence of any other evidence as to defendant's appearance, I do not think that the mere obtaining of such extension was a sufficient appearance on the part of the defendant to operate as a waiver to the irregularities in the service of the summons, and to confer jurisdiction.

Order appealed from must be reversed, with costs.

VAN WYCK and FITZSIMONS, JJ., concurred.

BEST, AS RECEIVER OF THE NATIONAL TRUST COMPANY, APPELLANT, *v.* THE DAVIS SEWING MACHINE COMPANY, *et al.*, RESPONDENTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; JUNE, 1892.

§ 406.

Limitation to action—when not extended by adjudication preventing bringing of action.

A party who seeks to avoid the statute limiting the time in which an action may be brought, notwithstanding the lapse of the prescribed period, must bring himself expressly within some of the exceptions specified in the statute.

McQueen *v.* Babcock (41 *Barb.* 337) Sanford *v.* Sanford (62 *N. Y.* 553) followed.

Where in an action upon certain bonds it appeared that they would be barred from the statute of limitations unless the operation thereof was suspended for a period of about five years, during which the defendant held a judgment against the plaintiff, awarding it possession of such bonds, rendered in an action to replevy, the same brought by it, which judgment was subse-

quently reversed,—*Held*, that the time limited for the commencement of the action was not extended by such judgment and that the action was barred by the statute.

(*Decided June*, 1892.)

Appeal by the plaintiff from a judgment of the New York county circuit entered in favor of the defendant upon a verdict of a jury directed in their favor and also from an order denying a motion for a new trial.

The opinion states the facts.

Delos McCurdy, for appellant.

John D. Kernan, for respondents.

PER CURIAM (VAN BRUNT, P.J., O'BRIEN and PATTERSON, JJ.).—In December, 1877, the National Trust Company of New York became insolvent, and the plaintiff was appointed receiver of its property. Final judgment of dissolution was entered in April, 1879, under which the plaintiff was continued as receiver. Among the assets which came into his hands were ten bonds purporting to be made by the Davis Sewing Machine Company for the sum of $1,000 each, which, by their terms, were due on November 1, 1876. These bonds, it would appear, had been pledged with the trust company as collateral for a loan to the Security Bank of Watertown, which remained unpaid at the time the receiver was appointed. In February, 1878, the Davis Sewing Machine Company (by leave of this court) brought against the receiver an action of replevin for the bonds, demanding judgment for their possession and damages for their detention. The answer of the receiver claimed a lien thereon for the unpaid balance of the loan for which they were pledged as security. A trial was had upon the issue thus raised in July, 1878, which resulted in favor of the sewing machine company, awarding them

possession, and adjudging that the receiver had no title to or right to the possession of the bonds. This judgment was, by the general term, reversed on October 19, 1883, and a new trial ordered. In May, 1884, the retrial was had, which resulted in a judgment in favor of the receiver, awarding him possession of the three bonds which are the subject of the present suit. From this judgment an appeal was taken to both the general term and the court of appeals, and the right of the receiver to the possession of the three bonds was finally affirmed.

This suit was commenced as to some of the defendants in March, and as to others in April, 1884. It will be noticed that from July, 1878, to October, 1883, there was a valid outstanding judgment against the receiver denying his ownership or right to the possession of these bonds, and awarding their possession to defendant. It is conceded that, if during this period, while the judgment was outstanding, the running of the statute of limitations was not suspended, then the statute is a bar to the action; for, the obligations being promissory notes, and not sealed instruments, the six years statute of limitations applies.

The Code provides (§ 406): "Where the commencement of an action has been stayed by injunction, or by other order of a court or judge, or by a statutory prohibition, the time of the continuance of the stay is not a part of the time limited for the commencement of the action."

Although there is much force in the argument of appellant that "the effect of the action of replevin and the judgment therein against the receiver was more potent than an injunction or other order of the court, for it not only barred his remedy on the obligations, but judicially denied his right to their possession"—it must be conceded that the judgment is not one of the exceptions provided by the Code preventing the running of the statute.

The question, therefore, is presented, whether there is any ground other than the exceptions provided by statute which will suspend the running of the statute of limitations after it has once commenced to run.

We agree with the view expressed by the learned judge below, "that the rule is well settled that a party who seeks to avoid the statute, notwithstanding the lapse of the prescribed period, must bring himself expressly within some of the exceptions specified in the Code." In the case of McQueen *v.* Babcock (41 *Barb.* 337), it was decided that a right of action not expressly stayed or prevented by an injunction must be prosecuted within the prescribed period or it is barred. In the case of Sanford *v.* Sanford (62 *N. Y.* 553), the debtor was declared a lunatic and had no committee who could be served. Although the argument was there made that for this reason the statute did not run, the court held that there was no provision for an exception in such a case. We think that the authority of this case and an examination of the earlier cases will show that the statute when once it commenced to run was not suspended except pursuant to some other express provision of law, and it was to abate the rigor of this rule that caused the enactment of section 406 of the Code.

In view of the clear and satisfactory opinion of the learned judge below, it is unnecessary for us to do more than adopt his reasoning and concur in the result reached by him. We are therefore of opinion that the judgment appealed from should be affirmed, with costs.

McKENNA, RESPONDENT, *v.* DUFFY *et al.*, RESPONDENT; SPENGLER, PURCHASER, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; JUNE, 1892.

§§ 421, 424, 1579, 1580.

Appearance—when judgment must contain evidence of authority of attorney to appear for non-resident—partition—when provision in judgment for payment of share of party to his attorney will relieve purchaser at sale.

The title offered upon the sale of real property under a judgment in an action for partition is properly objected to where it appears that certain parties defendants are non-residents and there is no evidence that the attorneys who appeared for them had authority to appear; to compel the purchaser at such sale to take title would be to throw upon him the burden of establishing the right of these attorneys to appear, and he is not bound to take any such risk.

In such a case the evidence of the attorneys authorized to act for the non-residents must be put upon the record before the purchaser can be compelled to take title, and if this is not done the judgment, so far as the purchaser is concerned, has no more validity than if it had been entered without any proof of the service of the summons or of any appearance by attorney of the non-resident defendants.

Vilas *v.* Chase (19 *N. Y. Civ. Pro.* 333); Nordlinger *v.* De Mier (18 *Id.* 47) followed.

The purchaser at a partition sale is entitled to purchase under a judgment which is binding upon the parties to the action, and cannot be compelled to take title under a judgment which several of the parties might, as a matter of right, claim should be set aside.

McKenna v. Duffy.

A decree in an action for partition directing a sale of real property involved which provides for the payment of costs and the shares of the parties to the action to the parties or their attorneys is irregular; it should direct that the costs be paid to the attorneys, and the share of the proceeds to the party to whom it belongs.

(*Decided June*, 1892.)

Appeal by the purchaser Charles Spengler, from an order of the New York county special term, denying a motion made by him to be relieved from the purchase made by him at a sale of real property under a decree of partition entered in this action.

The facts appear in the opinion.

Reeves & Todd, for Spengler, purchaser, appellant.

Jeroloman & Arrowsmith, for defendants, respondents.

J. Woolsey Shepard (*Dennis Quinn*, attorney), for plaintiff, respondent.

VAN BRUNT, P.J.—It appears that on the 26th day of October, 1884, John McKenna died intestate in the city of New York, seized of the premises in question. He left a widow, but no issue, and his only heirs at law were the plaintiff, two sisters, and the children of two deceased sisters.

The plaintiff and several of the defendants are non-residents of the United States, and have never been served with process of any kind, the complaint being verified by the attorney of record. The non-resident defendants, however, appeared by attorney. The plaintiff's attorney having died, an order was made substituting a new attorney, without the consent of the plaintiff,

as far as the record shows, in violation of the rules of the court.

It is true that the attorney desiring to be substituted stated that he had a cablegram from the plaintiff wherein he was directed to appear before him, and be substituted as his attorney; but no such cablegram was produced, and if produced would not be a compliance with the rule. This attorney having died, another attorney assumed to appear for the plaintiff without even the formality of a substitution. It further appeared that certain proceedings had been taken to declare the plaintiff a lunatic, which, however, did not result in a final adjudication upon that subject. The purchaser, upon examining the title, refused to take because of the pendency of the proceedings against the plaintiff; and also because no authority for the attorneys to appear in the partition suit was shown, and the parties being non-residents, and not served with process, might come in and show an unauthorized appearance and overthrow the judgment; and that upon the record the then present plaintiff's attorney had no authority to act.

Without at all discussing the validity of the objection in respect to the lunacy proceedings, it is sufficient to say that the objection to the title, because there is no evidence that the attorneys for the non-residents had right to appear, is well taken. In the case of Vilas *v.* Chase (19 *N. Y. Civ. Pro.* 333), the rule laid down in this court in the case of Nordlinger *v.* De Mier (18 *Id.* 47) is expressly recognized, which was to the effect that a judgment obtained against a non-resident, who has not been served with process, and has not authorized the appearance of an attorney, will be set aside as void.

The result, therefore, of compelling the appellant to take this title would be to throw upon him the burden of establishing the authority of these various attorneys to appear. We do not think that he is bound to take any such risk.

If the parties desire to proceed in this irregular way, as far as non-residents are concerned, they must put upon the record the evidence of the attorney's authority to act before purchaser can be compelled to take the title. The purchaser at a partition sale is entitled to purchase under a judgment which is binding upon the parties to the action, and cannot be compelled to take title under a judgment which several of those parties might, as a matter of right, claim should be set aside. As far as this purchaser is concerned, the judgment has no more validity than if it had been entered without any proof of service of the summons or any appearance by attorney of the non-resident defendants.

There is another objection to the regularity of the decree entered in this action, which, although not taken by the appellant, yet it is proper that this court should take notice of the same; and that is the direction in the judgment that the share of each party is to be paid to the party or to his attorney, evidently referring to his attorney of record.

This is in direct violation of the provisions of section 1580 of the Code. By section 1579 it is provided that where final judgment confirming a sale is rendered, the costs of each party to the action and the expenses of the sale must be deducted from the proceeds of sale, and each party's costs must be paid to his attorney. But, when it comes to the distribution of the proceeds of the sale, after deducting the expenses and costs chargeable against them, a different provision is made by section 1580, which provides that the proceeds of the sale, after deducting therefrom the costs and expenses, must be awarded to the parties whose rights and interests have been sold, in proportion thereto, and not to the party or his attorney.

The intention is manifest that the costs and expenses are to be paid to the attorney, and the balance of the proceeds to be paid to the parties, and must be so

awarded by the final judgment or decree. In the case at bar the award is to the party or his attorney, no regard being had to the distinction made in the sections of the Code above referred to between costs and principal.

The order appealed from should, therefore, be reversed, with costs and disbursements of the appeal, and the motion granted, with costs.

O'BRIEN, J., concurred.

BARRETT, J. (concurring).—The purchaser in his motion papers questioned the authority of the attorneys for the non-residents, and stated that he had been unable to find any such authority. That, at least, put upon those seeking to uphold the judgment the burden of meeting such doubts by clear proof of authority, verified in such a manner as to furnish lasting evidence upon the record. It certainly was not the purchaser's duty to go or send abroad to find and file such record proof.

I also feel that a purchaser should not be required to take title in a case where the plaintiff's attorney was never apparently substituted by any order of the court, and where there is not the slightest record evidence of his right to enter the case at all.

BOWMAN, AS ASSIGNEE OF LOUIS R. MENGER, FOR THE BENEFIT OF HIS CREDITORS, *v.* HOFFMAN AND ANOTHER.

NEW YORK COURT OF COMMON PLEAS, EQUITY TERM; AUGUST, 1892.

§§ 382, 388, 410, 1737 *et seq.*

Limitation of action—to foreclose lien on chattel.

By the pledge of a chattel as security for a debt, the title to the chattel does not pass to the pledgee, but remains in the pledgor until it is divested by a sale upon notice or by judicial proceeding,[1] and it passes by an assignment made by the pledgee for the benefit of his creditors.[2]

The right of a pledgee to hold possession of the property pledged is not affected by the recovery of judgment against the pledgor for the amount of the indebtedness to secure which the property was pledged,[4] nor is it affected by the fact that a receivership of the pledgor's property in supplementary proceedings has been extended to the pledgee's judgment.[3]

The statute of limitations does not commence to run against a cause of action to foreclose a lien upon a chattel pledged to secure a debt so long as the right of the pledgor to redeem exists, and where such right to redeem is not limited by agreement, and the right to redeem has not been asserted, the action is not barred by any lapse of time.[5-11]

Bailey *v.* Drew (17 *St. Rep.* 185);[7, 10] Miner *v.* Beekman (50 *N. Y.* 337);[7] Purdy *v.* Sistare (2 *Hun*, 126);[8] Roberts *v.* Berdell (15 *Abb. Pr. N. S.* 183)[9] followed. Roberts *v.* Sikes (30 *Barb.* 173) not followed, and held to have been overruled.[6, 7]

(*Decided August*, 1892.)

Motion by the defendant Pate, as receiver of the property of the defendant Hoffman, to dismiss the complaint made upon the trial of an action to foreclose a lien upon a chattel.

The facts are stated in the opinion.

C. E. Souther, for defendant Pate, and motion.

Halcyon M. Close, for plaintiff, opposed.

GIEGERICH, J.—This action is brought by the assignee of one Louis R. Menger to foreclose a lien on an oil-painting, entitled "Niagara," which is alleged to have been pledged by the defendant Hoffman to secure the payment of a debt, or demand, owing by said defendant Hoffman to said Menger for work and materials furnished and money loaned by said Menger to defendant Hoffman between the 20th day of August, 1869, and the 27th day of November, 1878. The complaint further alleges that, on or about the 15th day of January, 1885, the said Menger made an assignment to the plaintiff of all his property and assets, including the debt mentioned and the security pledged therefor, for the benefit of creditors; that, on or about the 14th day of March, 1889, the plaintiff recovered judgment against the defendant Hoffman in this court for the above-mentioned demand; that an execution was issued to the sheriff, and returned wholly unsatisfied; that, on or about the 28th day of July, 1890, the defendant Pate was, by an order of the supreme court, duly appointed as the receiver in supplementary proceedings of all the property of the said defendant Hoffman, and thereafter this court, by its order, extended the receivership of the defendant Pate to supplementary proceedings upon it; and that, on or about the 27th day of October, 1890, in proceedings had for the purpose, the supreme court granted

leave to the plaintiff to sue the defendant Pate as receiver and to bring this action.

The defendant Pate, as such receiver, by his answer, among other things, interposes two defenses of the statute of limitations—namely: "Second, That the cause of action therein stated did not accrue within six years before the commencement of this action. Third, That the cause of action therein stated did not accrue within ten years before the commencement of this action." Upon questions of fact raised by the pleadings, issues were framed by an order in this action dated January 20, 1892, by which it is provided that, in case the complaint be not dismissed upon the issues of law raised by the second and third defenses stated in the answer thereto of the defendant Pate, the questions of fact annexed to said order be submitted to a jury and their verdict had thereupon.

By the pledge of the chattel as security for the debt the title of the chattel did not pass to the pledgee. The title remained in the pledgor until it was divested
[1] by a sale upon notice or by judicial proceeding (Markham *v.* Jauden, 41 *N. Y.* 235; Stearns *v.* Marsh, 4 *Denio*, 230; Brownell *v.* Hawkins, 4 *Barb.* 491; Gruman *v.* Smith, 81 *N. Y.* 25; Bailey *v.* Drew, 17 *St. R.* 185).

The special property of Menger in the painting passed to the plaintiff on the assignment by said Menger
[2] to the plaintiff of all his property for the benefit of his creditors.

The fact that the receiver of the property of the defendant Hoffman, appointed on the application of another creditor, was extended so that the receiver-
[3] ship would include the judgment obtained by the plaintiff, did not affect his right to hold the security until the debt was paid (Pate *v.* Hoffman, 40 *St. R.* 915; s. c., 16 *N. Y. Supp.* 74).

The right of plaintiff to hold possession of the prop-

erty upon which he has a lien was not affected by the recovery of the judgment for the amount of the
[4] indebtedness to secure the payment of which he held the property as security (Pate *v.* Hoffman, *supra;* Lincoln *v.* Linde, 16 *N. Y. Supp.* 106; s. c., 27 *Abb. N. C.* 278).

The defendant Pate, as receiver, urges that the lien has been barred by the statute of limitations; but, considering this case in the light of the authorities
[5] hereinafter cited, I am of the opinion that the cause of action did not accrue until the filing of the complaint. Chancellor Kent defines the rights of the parties to a pledge, particularly as to the sale and redemption thereof, as follows: "The general property does not pass, as in the case of a mortgage, and the pawnee has only a special property. If no time of redemption be fixed by the contract, the pawnor may redeem at any time, and though a day of payment be fixed he may redeem after the day. He has his whole lifetime to redeem provided the pawnee does not call upon him to redeem, as he has a right to do at any time in his discretion if no time for redemption be fixed; and if no such call be made, the representatives of the pawnor may redeem after his death. As early as the time of Glanville, these just and plain principles of the law of pledges were essentially recognized; it was declared that if the pledge was not redeemed by the time appointed, the creditor might take recourse to the law and compel the pawnor to redeem by a given day or be forever foreclosed and barred of his right. And if no time of redemption was fixed, the creditor might call upon the debtor at any time by legal process to redeem or lose his pledge" (4 *Kent's Comm.*, 13th ed., p. 138).

Roberts *v.* Sikes (30 *Barb.* 173) was an equitable action, brought by the pledgor against the personal representatives of the pledgee for the redemption
[6] and reassignment of the stock pledged as security

for the payment of a note. The defense set up in the answer was the statute of limitations. SUTHERLAND, J., held that the action was barred by the statute of limitations as it was not brought within ten years from the time the note became due. The foregoing case is distinguishable from the one at bar. In that case the time for the redemption of the pledge was fixed by the contract between the parties, but in this case the debt was payable on demand, and no time of redemption was fixed.

The above-mentioned case of Roberts *v.* Sikes must, however, be considered as overruled by all reported cases arising subsequent thereto in this state, and [7] in Bailey *v.* Drew (*supra*), INGRAHAM, J., expressly held that the same must be considered as overruled by Miner *v.* Beekman (50 *N. Y.* 337).

In Purdy *v.* Sistare (2 *Hun*, 126) the plaintiff delivered certain bonds to the defendant, who advanced a sum of money thereon. On the defendant's re- [8] fusal to render an account, the plaintiff brought an action for an accounting, in which the defendant interposed the defense of the statute of limitations, and it was held that the defense was properly overruled; that the pledge of the bonds with the power of sale created a direct trust, and that in such cases the statute does not begin to run as a general rule unless there be an open denial or repudiation of the trust, or some notice of an adverse claim.

In Roberts *v.* Berdell (15 *Abb. N. S.* 183) the loan for the payment of which certain bonds had been pledged had been paid more than six years before the com- [9] mencement of the action, but the demand for the return of the bonds, and the refusal of the pledgee to comply was within the sixth year. It was held by the court of appeals that the cause of action was not barred until six years after the formal demand and refusal, although the payment and previous request for return of

the pledge took place more than six years before the action was brought.

Bailey *v.* Drew (*supra*) was an action by the assignee of the pledgor for an accounting. The defendant pleaded the statute of limitations, and it was [10] held that the right to invoke the aid of a court of equity to ascertain the amount due upon an obligation secured by the pledge of personal property was a continuing right, and continues as long as the right to redeem exists; that the cause of action does not depend upon the rights of the parties as they existed at the time of the pledge, but depends upon the right of the pledgor to redeem at the time the bill was filed, and the cause of action upon which such bill is founded accrues not when the collateral security was first pledged, but when the right to redeem was first insisted upon—namely, upon the filing of the bill; and that the statute of limitations was no bar to the action.

It follows that the statute of limitations had not run against the action when it was commenced.

The motion to dismiss the complaint upon the [11] issues of law raised by the second and third defenses in the answer of the defendant Pate, as receiver, is, therefore, denied, and the questions of fact annexed to the order herein of January 20, 1892, are, in conformity therewith, directed to be submitted to a jury and their verdict had thereupon.

In re MARY MONELL AS ADMINISTRATRIX, ETC.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; JUNE, 1892.

§§ 2530, 2531.

Special guardian—appointment of, not affected by subsequent appointment of general guardian.

Where, pending the accounting of an administratrix, the letters issued to a general guardian of an infant are revoked by request of his sureties, the surrogate is not only clearly right in appointing a special guardian for the infant, but he is in duty bound to do so in order that the rights of the infant may be protected upon the accounting;[3] and the appointment of such special guardian is not nullified or rendered of no effect by the subsequent appointment of a general guardian,[4, 7] and while the general guardian has the right to appear in the accounting proceeding his right in no way conflicts with the rights of the special guardian.[5]

The requirement of the statute (*Code of Civil Procedure*, § 2531) that notice shall be given an infant of an application for the appointment of a special guardian of him has no application where the surrogate appoints a special guardian upon his own motion.[6]

In such a case the papers need not state whether the infant resides with his parents and approves the application.[1, 2]

A surrogate having once acquired jurisdiction to appoint a special guardian of an infant there is nothing in the statute that revokes such an appointment simply because he grants an application for the appointment of a general guardian.[4, 7]

The power conferred upon a surrogate by statute cannot be limited by a rule made by himself, and a rule so made has no bearing whatever upon the validity of an order made by him.[8]

(*Decided June*, 1892.)

In re Mary Monell.

Appeal from an order of the surrogate of New York county denying a motion to revoke the appointment of a special guardian.

The facts appear in the opinion.

T. Darlington, for appellant.

S. W. Fullerton, for respondent.

VAN BRUNT, P.J.—The facts shown upon the record appear to be that the appellant, as administratrix, filed her account and vouchers in the surrogate's office, and that the general guardian of the infants who were interested in the estate appeared and filed objections to the account. A reference was ordered, based upon the objections, and while such reference was in progress the letters of the general guardian were revoked at the request of the sureties upon his bond, and the surrogate immediately thereafter, upon his own motion, appointed a special guardian to protect the interest of the infant on the reference. Subsequently, a new general guardian was appointed, and the administratrix moved for the revocation of the appointment of the special guardian, which was refused, and from the order thereupon entered this appeal is taken.

It is contended upon this appeal by the administratrix that the right of the general guardian to appear and protect the interest of the infant is given him by statute, and cannot be taken away until after a judicial investigation, showing that the interests of the infant will suffer from the guardian being adverse or incompetent, or some other reason judicially ascertained, in which case the surrogate may appoint a special guardian, and that notice of the application for special guardian must
[1] be served upon the infant under section 2531 of the Code, and that, under rule 10 of the surro-

gate's court, the fact whether the infant resides with his parent and approves the application or not must be stated.

It is difficult to see how the powers of the surrogate conferred upon him by statute can be limited by a rule made by himself, and, therefore, it is entirely im-
[2] material what the requirements of the rule referred to may be. It can have no bearing whatever upon the validity of the order appealed from.

It seems to us that the surrogate was not only clearly right in making the appointment of a special guardian, upon the removal of the general guardian, but he
[3] was in duty bound to do so, in order that the rights of the infant may be protected upon this accounting. And there is no provision whatever in the Code which either nullifies or makes of no effect
[4] such appointment of a special guardian merely because a general guardian is subsequently appointed.

It may be true that the general guardian has the right to appear upon the proceedings in progress;
[5] but that in no way conflicts with the rights of the special guardian.

In respect to the question of notice, the requirements of section 2531 have no application whatever to this case, in which the surrogate, upon his own motion, makes
[6] the appointment of a special guardian, but only to those cases where somebody else other than the infant or the committee of an incompetent person applies for such appointment. By section 2530 authority is expressly given to the surrogate to appoint a special guardian where there is no general guardian. And, as already seen, at the time of the appointment of this special guardian, there was no general guardian, or any person to look after the interests of these infants.
[7] The surrogate once having acquired jurisdiction to appoint a special guardian, there is nothing in

the statute which revokes such appointment simply because he grants the application for the appointment of a general guardian.

The order should be affirmed, with costs.

O'BRIEN and BARRETT, JJ., concurred.

DUDLEY, APPELLANT, *v.* THE CONGREGATION OF THE THIRD ORDER OF ST. FRANCIS, RESPONDENT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; JUNE, 1892.

§§ 1626 *et seq.*

Action to foreclose mortgage—what judgment cannot be granted in—When action will not lie to remove cloud from title—Mortgage by charitable or benevolent corporation when void.

The only power a charitable or benevolent corporation has to mortgage its property is derived from Laws of 1854, chap. 50, and this power is qualified by the direct terms of the statute requiring as a condition of its exercise that the permission of the supreme court be first obtained.[5] Any attempt by such a corporation without the consent of the court to place a lien by way of mortgage upon its real estate would be utterly ineffectual to create a valid encumbrance, and a mortgage so made never has a valid existence and does not constitute a lien.[1-3]

In an action to foreclose a mortgage where it is held that the mortgage is void, the plaintiff cannot have judgment as in a common law action of covenant.[4] A suit brought to foreclose a mortgage is one in equity, and the statute provides what may be done and what judgment may be rendered therein. The remedy is distinctly against the land itself; the whole scope of the ac-

tion is to enforce a lien upon the land, and the only office of the allegations of the complaint respecting the bond and the amount due under it is to show that the principal debt to which the mortgage is collateral has accrued and is due, and that the plaintiff is entitled to enforce his security.[4-6]

Loeb v. Willis (22 *Hun.*, 509) followed.[5]

The distinction between equitable and legal causes of action and the remedies appropriate to them still exists, and no recovery can be had at law where the whole scope and purpose of the action is limited to equitable relief.[6]

Where, in an action to foreclose a mortgage, the defendant alleges facts showing that the mortgage is invalid and asks that it be canceled, he is not entitled to any more relief than would have been awarded him if a bill had been filed to remove a cloud on title.[7]

Where it appears that an instrument or encumbrance claimed to be a cloud upon a title is void upon its face, no action in equity can be maintained to remove it, because a title so obviously void does not constitute even a cloud upon the title of the owner.[8]

(*Decided June*, 1892.)

Appeal by the plaintiff from a judgment of the New York county special term dismissing the complaint and granting defendant affirmative relief.

The facts are stated in the opinion.

William H. Shepard, for plaintiff, appellant.

Peter B. Olney, for defendant, respondent.

PATTERSON, J.—This action was brought to foreclose a mortgage executed and delivered by the defendant to the plaintiff as collateral to a bond to secure the sum of $2000. The defendant is a benevolent corporation, organized under chap. 319 of the Laws of 1848. There was contained in the mortgage a clause permitting the mortgagor, on default in payment of interest as and when it became due, to elect to consider the whole amount of the principal as due, and upon a failure to pay an install-

ment of interest the election was made and this suit instituted.

On the trial it was not shown that permission had been obtained by the mortgagor from the supreme court to make this mortgage, but it appeared that it was given without such permission, and no order had been applied for or made, providing for the application of the money arising from the mortgage.

The justice presiding at the special term held that the mortgage was void, because of the failure to procure an order of the supreme court, and he directed judgment that the complaint be dismissed, that the mortgage be canceled of record as a cloud on the title (that relief having been asked by the defendant in its answer), and he refused to render judgment for the defendant for the amount of the bond, the plaintiff having claimed that, although the relief prayed for, viz., the foreclosure of the mortgage, could not be granted, he was entitled, nevertheless, to recover on the bond precisely as if the action had been based on that instrument alone.

These several rulings of the court below are now brought up for review upon the appeal from the judgment entered on the findings made upon the trial.

The learned judge was right in holding that the mortgage was void. It was executed and delivered without any lawful authority, and could not constitute [1] a valid lien upon the mortgaged premises. The only power a charitable or benevolent corporation has to mortgage its property is derived from chapter 50 of the Laws of 1854, which conferred upon societies of that character such power, and that was done in the following words: "It shall be lawful for the supreme court of this state, upon the application of any benevolent, charitable, scientific or missionary society, incorporated by law, in case it shall deem it proper, to make an order for the mortgaging of any real estate belonging to said corporation, and to direct the application of the moneys

arising therefrom by the said corporation to such uses as the same corporation, with the consent and approbation of the said court, shall conceive to be most for the interest of the society to which the real estate so mortgaged belongs."

It is in consequence of this enabling act, which extends the powers of corporations of this character with respect to their real estate, that mortgages can be made; and that being so, it would necessarily follow that any attempt on the part of such a corporation without the consent of the court to place a lien by way of mortgage upon its real estate would be utterly ineffectual to create a valid incumbrance. The power is one qualified by the direct terms of the statute, and its exercise is conditioned altogether upon permission to be obtained from the supreme court.

[*]

Not only was there no authority existing previous to the passage of that act, but it was expressly interdicted to corporations of this class to exercise any powers other than those contained in chapter 319 of the Laws of 1848, which authorizes their creation, or in the general corporation act as it existed when the statute of 1848 was passed. By section 2 of the act of 1848, provision is made as to certain powers conferred thereby on corporations organized for benevolent, charitable, scientific or missionary purposes. But what is there granted is not altogether the full measure of their powers. Section 9 of that act provides that each corporation formed thereunder shall possess the general powers conferred by, and be subject to, the provisions and restrictions of the third title of the 18th chapter of the third part of the Revised Statutes. The reference to the third part of the Revised Statutes is evidently an error, which we find was cured by an act passed April 7, 1849, which makes the correction, namely: "The third title of the 18th chapter of the first part of the Revised Statutes." That title third defines the general powers, privileges and

liabilities of corporations. In its first section it sets forth the general powers; the power to mortgage is not enumerated among them. By section third it is provided: "In addition to the powers enumerated in the first section of this title, and to those expressly given in its charter or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given." Nothing contained in the act of 1848 gives the power to mortgage.

The learned judge who presided at the trial was, therefore, right in holding that the mortgage to foreclose which this action was brought never had a valid [3] existence, and did not constitute a lien; and the complaint in that regard was properly dismissed.

The refusal to allow judgment on the complaint as in a common-law action in covenant was also right. The suit was brought exclusively as one for the fore- [4] closure of a mortgage. Such a suit is one in equity, and the statute provides what may be done and what judgment may be rendered therein. An action upon the bond could not be maintained without leave of the court while a suit to foreclose was pending. The remedy in foreclosure is distinctly against the land itself, and the whole scope of the action is to enforce the lien upon the land, to subject it to the payment of the mortgage, to realize out of the sale of the mortgaged premises the amount of the lien, and provision is made for a personal judgment for deficiency against the mortgagor or whoever may be liable upon the bond. It is in its nature and essence simply a suit to realize upon the collateral security, and the only office of the allegations of the complaint in foreclosure respecting the bond and the amount due under it is to show that the principal debt for which the mortgage is

collateral has accrued and is due, and that the plaintiff is entitled to enforce his security.

The language of Mr. Justice BARRETT, in the opinion of the general term of this court in Loeb v. Willis [5] (22 *Hun*, 509),* is quite appropriate. There judgment of foreclosure and sale had been entered. The plaintiff procured an order vacating the judgment and allowing an amendment by the introduction of an additional party. A prior mortgage was upon the property, and before any further proceedings were taken in plaintiff's suit that prior mortgage was foreclosed, the mortgaged premises sold, and only sufficient was realized to pay the first mortgage and costs. A motion was made by the plaintiff to vacate the order setting aside the judgment and for a direction that a judgment for deficiency be entered against the defendant for the full amount due on the second mortgage and the bond. That was tantamount to asking judgment in that foreclosure suit for the full amount of the bond and as in an action upon the bond, and the court said: "The defendant is doubtless still liable upon his bond. That liability may well be the full amount of such bond and interest. But in reaching that result the forms of law cannot be disregarded, and the plaintiff must resort to the appropriate action to enforce that liability. In the present form of action (a foreclosure suit) he could not, for instance, join a count upon the bond and seek an independent judgment *in personam;* nor, during the pendency of the foreclosure proceedings, could he even bring a separate action upon the bond without leave of the court. It is quite clear that while his pleadings and proceedings remain unchanged he cannot, upon a

* This decision was followed by the general term of the supreme court, in the first department, in Frank v. Davis (21 *N. Y. Civ. Pro.* 374), and the later decision of Siewerk v. Hamel (33 *Hun*, 44), to the contary, was overruled.

mere suggestion that his foreclosure as such has become futile, be permitted to enter what, though styled a deficiency judgment, is in reality equivalent to and in substance nothing more nor less than a direct judgment *in personam* upon the bond."

The contention of the plaintiff that, because he has failed to establish his equitable cause of action,
[6] he is entitled to a legal remedy, for the reason that he has set forth an indebtedness upon the bond which would be sufficient to maintain a recovery at law, has no support whatever in any of the authoritative decisions of the courts of this state. The distinction between equitable and legal causes of action, and the remedies appropriate to them, still exists (Graham *v.* Reed, 57 *N. Y.* 681; Stevens *v.* Mayor, 84 *N. Y.* 296; Gould *v.* Cayuga Bank, 86 *N. Y.* 75), and no recovery can be had at law where the whole scope and purpose of the action is limited to equitable relief (Harwood *v.* Buffalo, 14 *N. Y.* 540; Bradley *v.* Aldrich, 40 *N. Y.* 504; Man *v.* Fairchild, 2 *Keyes*, 106; Peters *v.* Delaplaine, 49 *N. Y.* 362).

This rule is not affected by other cases which hold that where a complaint is broad enough in its averments to entitle the plaintiff to either equitable relief or a legal remedy, and where the demand for judgment is appropriate to an action which presents all the facts in the double aspect of a suit in equity and an action at law, failing one, relief as to the other may be granted. Such cases are: Sternberger *v.* McGovern (56 *N. Y.* 12); Seeley *v.* N. Y. Exchange Nat. Bank (8 *Daly*, 402; affirmed 78 *N. Y.* 608); Cogswell *v.* New Haven R. R. Co.; (105 *N. Y.* 319). In the case at bar nothing was sought but a foreclosure, and the prayer is made in the amended complaint for a sale, the bringing of the money arising from the sale into court, the payment of the amount of the bond out of the proceeds, and for a judgment for deficiency, if any should exist, against the

mortgagor. No judgment on the bond on the failure to establish the right to foreclose the mortgage could be allowed in such a case.

But, with respect to the provision of the decree in regard to the cancellation of the mortgage, we [7] think the learned judge fell inadvertently into error. The defendant was asking for affirmative relief, and certainly was not entitled to any more than would have been awarded to it had a bill been filed to remove a cloud on title.

In such an action, if it appeared to the court that the instrument or encumbrance claimed to be a [8] cloud is void upon its face, the general rule is well summed up by RUGER, C.J., in Moores *v.* Townshend (102 *N. Y.* 393), where it is said: "When the invalidity of the disputed title appears upon the face of the conveyance, or in any proof which the claimant is required to produce in order to maintain an action to establish it, no suit whatever can be maintained in equity to set it aside, because it is said that a title obviously void does not constitute even a cloud on the title of the true owner." And the principle applies here. In order to enforce this mortgage lien, it would be necessary to show that the mortgage was authorized by the supreme court, it appearing upon the face of the mortgage that it was one made by a corporation having no power to deliver such instruments without the antecedent permission of the court contained in an order of the court, and which necessarily would be entered in the records of the court.

With the particular importance of this provision of the decree in the present action we are not concerned; but, as we conceive it to be an improper provision, it should be stricken out. With this modification, the decree must be affirmed, without costs.

VAN BRUNT, P.J. (concurring).—The case of Arnold *v.*

Angel (62 *N. Y.* 508) also illustrates the rule stated in within opinion. I concur.

O'BRIEN, J., concurred.

PEOPLE *ex rel.* GRIFFIN, RESPONDENT, *v.* RYDER, AS COUNTY TREASURER OF THE COUNTY OF PUTNAM, APPELLANT.

SUPREME COURT, SECOND DEPARTMENT, GENERAL TERM; JULY, 1892.

§§ 841, 1582.

Partition—distribution of unclaimed moneys paid into court or to treasurer of a county.

Section 1582 of the Code of Civil Procedure as amended by Laws of 1891, ch. 365, providing, among other things, that where the share of the defendant, in an action for partition of real property, of the proceeds of a sale of such property, has been paid into court or deposited with the treasurer of any county and remained unclaimed for twenty-five years, a proceeding may be taken to procure its distribution, and providing how such proceeding shall be taken and for such distribution, is unconstitutional because (1) it does not provide for service of notice of the proceeding upon known heirs who were not parties to the original suit, and (2) also because it provides for distribution to the known heirs, their heirs and assigns, and not to the next of kin, distributees or representatives, and thereby divests next of kin and devisees of property thitherto vested in them.

It seems that it is within the power of the legislature, in the case of an unclaimed deposit of moneys arising upon a sale of land in an action for partition, to enact that, from the lapse of time and

failure of any person to appear and make claim, it shall be presumed that unknown owners were a non-existing class at the time of the decree, and to provide, for appropriate proceedings, for the distribution of the funds among the persons who would have been entitled to it if there had been no such unknown persons, if reasonable notice be provided for, and an opportunity be offered for all persons in interest to appear and protect their rights.
(*Decided July* 2, 1892.)

Appeal by the defendant from an order of the Westchester county special term granting a writ of peremptory mandamus directing defendant to pay over to certain known heirs moneys paid into court over twenty-five years ago for the benefit of certain unknown heirs.

In September, 1862, an action was brought in the supreme court in Putnam county by certain heirs of Louis B. Griffin for the partition of real estate situate in that county, and which he had died seized intestate; and in April, 1863, a judgment was entered directing the sale of such land, under which a sale was had on December 19, 1863. The land brought $6480, and one fifth of the sum remaining of this amount after deducting the costs of the suit and the expenses of the sale was brought into court and deposited with the county treasurer of Putnam county as the share of the unknown heirs of Deborah Ann McCormack, a deceased sister of said Louis B. Griffin. In February, 1890, proceedings were taken by one Abram J. Miller, under sections 841 and 1582 of the Code of Civil Procedure as they then existed, for a distribution among the known heirs of Louis B. Griffin of the moneys so deposited; and these proceedings resulted in an order directing the distribution of the moneys and the issuance by the Westchester county special term of a peremptory writ of mandamus requiring the county treasurer to pay the sum over accordingly. From the order directing the issuance of such peremptory writ of mandamus the county treasurer of Westchester county, who was defendant in that pro-

ceeding and is defendant in this, appealed to the general term of the supreme court, in the second department, where the order of the special term was affirmed (see People *ex rel.* Miller *v.* Ryder, 58 *Hun*, 407; s. c., 34 *St. Rep.* 322; 12 *N. Y. Supp.* 48), and the defendant, said county treasurer, appealed from the order of affirmance thereupon entered to the court of appeals, where the determinations of the special and general terms were reversed (see People *ex rel.* Miller *v.* Ryder, 20 *N. Y. Civ. Pro.* 172), and the application for a mandamus denied, on the ground that the provisions of the Code relative to the distribution of moneys deposited in such a case were unconstitutional. Thereafter by chapters 364 and 365 of the Laws of 1891 such provision of the Code were amended for the purpose of obviating the objection taken to their validity by the court of appeals, and a new proceeding was thereupon brought, resulting in an order directing the distribution of the moneys so on deposit and the granting of a peremptory writ of mandamus directing the payment thereof accordingly. From the order directing the issuance of such peremptory mandamus this appeal was taken by the defendant, the county treasurer of Westchester county.

Clayton Ryder, for defendant, appellant.

Abram J. Miller, for plaintiff, respondent.

CULLEN, J.—This is an appeal from an order directing a writ of mandamus to issue to the appellant, commanding him to pay over moneys deposited in a partition suit to the credit of unknown heirs, in accordance with a decree of distribution, under section 1582, Code Civil Procedure. There had been made a previous decree of distribution under this section as it stood in 1890. The appellant refused to comply with it, and was upheld in his refusal by the court of appeals (20 *N. Y. Civ. Pro.*

172), which held the provisions of this section unconstitutional and void. This section, and section 841, Code, were amended in 1891 (chapters 364, 365), and thereupon a new proceeding was instituted, and another order of distribution made. The appellant refuses compliance, contending that the provisions of section 1582 are still invalid.

We believe that it is within the power of the legislature, in the case of an unclaimed deposit of this character, to enact that, from the lapse of time and failure of any person to appear and make claim, it shall be presumed that an unknown was a non-existing class at the time of the decree, and to provide, by appropriate proceeding, for a distribution of the fund among the persons who would have been entitled to it if there had been no such unknown persons, if reasonable notice be provided for, and an opportunity be afforded to all persons in interest to appear and protect their rights. But we think that there are two fatal objections to the validity of the proceedings authorized by the section named. Two classes of persons are described—the unknown heirs and the known heirs. Known heirs are those persons who are known, and whose right to inherit, or the extent of whose right to inherit, is dependent on the non-existence of other persons nearer or as near to the ancestor in the line of descent. In default of appearance by any unknown heir, the court is to order a distribution among the known "heirs, their heirs or assigns, and not next of kin, distributees or representatives, . . . of the respective shares or portions of or interest in such proceeds to which they are entitled." The order or decree, therefore, determines the rights of the known heirs among themselves. The statute provides for notice of the application to the unknown heirs by publication, but no notice whatever upon the known heirs or their successors in interest is provided for. It is entirely possible that such known heirs may not

have been parties to the original suit, and certainly the judgment in partition did not, and could not, determine the rights, even of the parties to it in the share deposited. The legislature could not empower the court to adjudicate the rights of these persons in any proceeding of which they are to be given no notice, and to which they are not parties. The importance of notice appears in this very case, when we consider the second objection to this statute—the parties among whom it provides the distribution is to be made.

By the statute the distribution is to be to the known heirs, their heirs and assigns, and not to the next of kin, distributees or representatives. The only theory on which this proceeding, in its main scope and object, can be considered a valid exercise of legislative power, is that the known heirs were, as a matter of fact and law, at the time of the judgment and sale, entitled to the share deposited; that the judgment awarded the share to a class of persons which did not exist, in consequence of ignorance of such non-existence, and failed to award to the known heirs what was really their own; that now lapse of time and the non-appearance of any such class of unknown persons have proved the fact, which did not then appear, and, by the decree of distribution, the error of fact in the original judgment is corrected. Therefore the interest of any known heir in this fund was his property, and, upon his death, passed like other property, according to its nature, whether real or personal, either by will or by the statutes of distribution or descent, and the title of his successors in interest could not be divested by the legislature. If such interest was land, then it would pass by will to the devisees. But this statute directs that it shall be paid to the heir or assignee, and creates a *quasi* estate tail during the time of the deposit, subject, possibly, to be defeated by assignment. The only way to avoid this objection would be to construe "assignee" as including "devisee." This is not, how-

ever, the theory on which the special term proceeded. In the order of distribution, it is recited as to some of the original heirs that they died intestate; but as to the others, merely that they died leaving certain heirs, and the distribution is to such heirs. But the shares in this fund of the known heirs, who were adults at the time of the judgment and sale, were not in law realty, but personalty (Sweezy *v.* Thayer, 1 *Duer*, 286, opinion, 308).

It may be that as to sales subsequent to the statute, or even where the death of one of the original heirs was subsequent to that time, the legislature could make a rule for the succession, upon death, of property of this character, *sui generis*, and applicable to such property alone. But surely it cannot divest the next of kin or the devisee of property thitherto vested in them.

The order appealed from should be reversed, and the application denied, with $50 costs and disbursements.

BARNARD, P.J., concurred.

O'CONNOR, AS RECEIVER, ETC., RESPONDENT, *v.* THE MECHANICS' BANK, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; JUNE, 1892.

§ 3247.

Judgment creditor—when liable for costs incurred by receiver.

A judgment creditor who instigates and conducts an action for his own benefit through a receiver of his judgment debtor's property, appointed in proceeding ssupplementary to execution, is, if the

receiver is defeated in such litigation, liable for the costs awarded against him, and such liability is not affected by the fact that the judgment for costs has been assigned by the person to whom they were awarded to a third person, nor should the payment of the costs be deferred until the receiver has collected assets belonging to the judgment debtor which he is then pursuing and believes he will soon acquire.

Where, in such a case, the judgment was assigned to certain executors who were asserted to have in their possession moneys belonging to the judgment debtor and they offered to pay the amount of the judgment less the amount of the costs and hold the claim against the judgment debtor,—*Held*, that an order should be made directing that in case their offer was not accepted the judgment creditor pay said costs.

It seems that where a judgment creditor is unsuccessful in a litigation brought by him through a receiver in supplementary proceedings to secure property alleged to belong to the judgment debtor, costs awarded against the receiver in such action cannot be paid out of moneys belonging to the judgment debtor.

(*Decided June*, 1892.)

Appeal by the executors, etc., of H. W. Beecher, deceased, from an order of the New York county special term, denying a motion to compel one Chase, judgment creditor, on whose application the plaintiff was appointed receiver of the property, etc., of Herbert F. Beecher, to pay a judgment for costs awarded the defendant and assigned to the moving executors.

The facts are stated in the opinion.

William C. Beecher, for executors, etc., of H. W. Beecher, deceased, appellant.

Edwin R. Leavitt, for Chase, judgment creditor, respondent.

O'Brien, J.—In April, 1886, Lewis S. Chase recovered a judgment against Herbert F. Beecher, and in proceedings supplementary to execution the plaintiff

was appointed receiver of the property of the judgment debtor. Thereafter, upon the written request of Chase, and solely for his benefit, the plaintiff, as receiver, brought suit against the Mechanics' Bank, of Brooklyn, to recover the amount of a certain check which had been drawn by the executors of the estate of Henry Ward Beecher, deceased, upon the bank to the order of the judgment debtor. In this action, after two trials, the plaintiff was defeated, and a judgment for costs was entered in favor of the defendant. This judgment for costs was assigned to the executors of Beecher, and they make this motion to compel the judgment creditor, Chase, to pay the costs awarded by the judgment; and from the order refusing to grant such motion this appeal is made.

In Ward *v.* Roy (69 *N. Y.* 96, p. 99) it is held: "If a creditor, at whose instance a receiver has been appointed, and especially if he is solely interested, instigates and conducts a prosecution for his own benefit, through the receiver, the obligation to pay costs created by the statute is equitably as binding upon him as if the legal machinery was not employed."

We do not understand that any fault is found with this rule, which, in the absence of other facts, would require that Chase, the judgment creditor, who instigated the suit which was brought by the receiver against the bank, should pay such costs. Had this motion been made by the bank, therefore, we fail to see what defence or reason could have been interposed against the granting of the motion.

The question, however, is presented as to whether the assignee of a judgment for costs is in any worse position, or whether the circumstance that the assignees in this case happen to be the executors of Beecher, deceased, in any way militates against or destroys the right which otherwise the assignee of a judgment would

acquire by virtue of the assignment of such judgment to him.

As we understand, the respondent, while admitting if the receiver had now in his hands sufficient funds belonging to his receivership wherewith to pay these costs, that he would be obliged to pay them; or, if the receiver have no funds, that then, under Ward *v.* Roy (*supra*), the defendant might resort to the creditor; still, such a motion should not be granted until it should finally appear that the receiver would not be able to pay such costs. In other words, respondent's position is that inasmuch as certain proceedings have been taken by the receiver in the surrogate's court which may eventually result in placing in the hands of the receiver an amount sufficient not only to pay these costs, but also the judgment of the creditor, Chase, this motion is premature and should not be granted until proper opportunity and time are afforded the receiver and all efforts have been exhausted to collect an amount sufficient to pay the judgment for costs out of the judgment debtor. This assumes that, as against the judgment debtor, the plaintiff is entitled to receive not only an amount sufficient to pay the judgment which has been obtained against the debtor, but also an amount sufficient to pay the costs of an unsuccessful litigation waged by the receiver against a third party without the consent or knowledge of the judgment debtor.

It seems to us reasonably clear that, in a case like this where no other than the creditor Chase is interested in the receivership, the judgment debtor would have a right, on offering the amount of the judgment obtained against him, together with interest and costs, to have the same satisfied and the receiver discharged. This would not include, nor could the receiver insist upon the judgment debtor paying in addition, the costs of an unsuccessful litigation waged against a third party in an action to

which the judgment debtor was in no sense a party, and of which he had no notice.

We do not think that any distinction can be made between the right which the defendant, the Mechanics' Bank, had and those which flowed to the executors to whom the judgment for costs was assigned; and, therefore, they are in the same position to enforce the judgment for costs as the bank would have been in had not the assignment of the judgment been made. It has been made to appear that the receiver is now engaged in an endeavor to recover from the executors the amount of the judgment out of the property of the judgment debtor now in their hands. If successful in discovering such property, and in obtaining an order from the surrogate or otherwise, that the amount of the judgment should be paid by the executors out of the property of the judgment debtor, they would, in some form undoubtedly, be entitled to offset or deduct from such recovery the amount of the judgment for costs which they now hold by assignment against the plaintiff.

The executors have in open court offered to pay the difference between the judgment for costs assigned to them and the amount of the Chase judgment, the payment of which the receiver is seeking to enforce against the property of the judgment debtor. We regard this proposition as eminently fair, and as giving him all that he could obtain as the result of prolonged proceedings. If the receiver thinks that some law can be found to sustain his position that he is eventually entitled to recover from the judgment debtor, not only the amount of the Chase judgment, but also the costs of the unsuccessful action against the Mechanics' Bank, no good reason is presented why, in the mean time, the executors should be prevented from receiving the amount due them by reason of the claim which they have against Chase by virtue of the assignment of the judgment from the bank.

We are of opinion, therefore, that the proposition is eminently fair and just which is made by the appellant to offset the judgment for costs against the Chase judgment, the executors paying the difference, and holding their claim as against the judgment debtor; and that, upon the failure to accept this proposition, the executors are entitled to the order applied for, requiring the judgment creditor who was unsuccessful in a litigation against a third party to pay the costs thereby resulting, where it has been shown, as here, that the receiver is unable to pay them.

We think, therefore, that the order appealed from should be reversed, and, unless the respondent accepts the offer of the appellant in regard to offsetting the claims, that the motion should be granted.

Order reversed accordingly, with $10 costs and disbursements, and motion granted with costs.

VAN BRUNT, P.J., and BARRETT, J., concurred.

DIETLIN, RESPONDENT, *v.* EGAN, APPELLANT.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM; JUNE, 1892.

§§ 635 *et seq.*

Attachment—when motion to vacate may be denied.

A judge or jury who are called upon to determine a fact upon the testimony of witnesses may properly refuse to credit the testimony of a witness who is a party in interest, though it be wholly uncontradicted and his credibility not otherwise impaired.

Dietlin *v.* Egan.

An appeal to the court of common pleas from an order of the general term of the city court of New York, affirming an order of the special term denying a motion to vacate an attachment, will be dismissed where the only point urged in support of it is that the judge at special term did not credit an uncontradicted affidavit of the defendant showing a good and complete defense.

(*Decided June*, 1892.)

Appeal by the defendant from an order of the general term of the city court of New York, affirming an order of the special term, denying defendant's motion to vacate an attachment issued against his property.

The facts are stated in the opinion.

Arthur R. Robertson (*Robertson & Harman*, attorneys), for defendant, appellant.

Edmund Huerstel, for plaintiff, respondent.

BISCHOFF, J.—No claim is made on this appeal that plaintiff's affidavit, upon which the attachment was granted, did not, *prima facie*, present sufficient facts for that purpose, or that plaintiff's proceeding was in any respect irregular; but the sole ground upon which the propriety of the denial of defendant's motion to vacate the attachment is questioned is that the traverse by defendant's affidavit of the facts assigned in support of plaintiff's allegation of a valid and subsisting cause of action, which was necessary to support the attachment, left such alleged cause of action disproved.

Plaintiff's affidavit set forth that on or about January 26, 1891, he loaned and advanced to the defendant sixteen hundred dollars, for the repayment of which the latter gave him his promissory note, whereby he promised to repay the sum loaned with interest twenty days after the date thereof; but that at maturity the note remained

unpaid. Defendant's affidavit, made in support of his motion to vacate the attachment, besides denying the making of the loan as alleged by the plaintiff, set forth that the note referred to by the plaintiff is one of a series of renewals of a promissory note made by defendant, and given by him for an alleged usurious loan, the history of which down to the note in question he proceeded to narrate with much elaboration and detail.

In answer to defendant's affidavit, plaintiff submitted a further one, by which he denied, in the most general way, that he had made any corrupt and usurious agreement with the defendant relative to the note mentioned in his first affidavit, and omitted to deny specifically any of the facts and circumstances narrated by the defendant. This last affidavit, defendant contends, was insufficient to call the facts sworn to by him in question, and that these must, therefore, be taken as admitted, and plaintiff's alleged cause of action deemed disproved; hence, that the attachment should have been vacated.

We may agree with the defendant that plaintiff's last affidavit was deficient for the purposes of a denial, and assume that the facts narrated by the defendant, if established by competent and credible evidence, make out a complete defense to the note upon which this action is brought, and yet reach the conclusion that it was within the province of the justice of the court below, at special term, to deny defendant's motion to vacate the attachment, and, being so, that the exercise of his discretion is not reviewable by us.

In proper and sufficient support of defendant's claim that plaintiff's alleged cause of action was disproved by the facts narrated by the defendant and not denied by the plaintiff, it should appear that they were presented to the justice at special term by evidence so conclusive that his refusal to credit it was error in law. Can such be said to be the case here? The rules of evidence governing the testimony of witnesses upon the trial of a

disputed question of fact are the same, whether the trial be had upon oral testimony or the depositions of the witnesses; and, though these rules will not permit the uncontradicted testimony of a witness whose credibility is unimpeached and unaffected by inherent improbability of its truthfulness to be disregarded, there is an exception where the testimony is that of a party in interest, and the judge or jury who are called upon to determine a fact upon the testimony of witnesses may properly refuse to credit the testimony of a witness who is a party in interest, though it be wholly uncontradicted and his credibility not otherwise impeached (Elwood *v.* Western Union Tel. Co., 45 *N. Y.* 549, 553; Gildersleeve *v.* Landon, 73 *N. Y.* 609; Honegger *v.* Wettstein *et al.*, 94 *N. Y.* 252, 261).

It follows from the foregoing that the defendant cannot successfully claim as matter of right that his affidavit should have been credited by the justice at special term, and if the justice erred in the exercise of his discretion, the affirmance of his order denying defendant's motion to vacate the attachment by the general term of the court below is final and conclusive upon us.

The appeal should be dismissed, with costs.

DALY, C.J., concurs.

GRAFTON, APPELLANT, *v.* UNION FERRY COMPANY OF BROOKLYN. THE TRUSTEES OF THE UNION FERRY CO., RESPONDENTS.

CITY COURT OF BROOKLYN. GENERAL TERM; JUNE, 1892.

§§ 755 *et seq.*

Abatement of action for personal injuries on dissolution of corporate defendant.

An action against a corporation for personal injuries caused by the negligence of its servants abates on the dissolution, *pendente lite*, of the corporation by the lapse of the term of its existence, and cannot be continued against its trustees.

Hepworth *v.* Union Ferry Co. (*post*, p. 407, note) not followed.

At common law the dissolution of a corporation put an end to an action pending against it; under the statutes now in force the trustees or directors of the corporation become trustees for its creditors and stockholders, but they are not liable for its torts which are not debts, and an action brought by one injured while a passenger upon a ferry-boat owned by the corporation cannot be continued against them on the ground that he is a "creditor" because the corporation contracted to carry him as a passenger safely, the gravamen of the action being for carelessness and negligence and not for breach of contract.

Grafton *v.* Union Ferry Co. (20 *N. Y. Civ. Pro.* 238) affirmed. (*Decided June*, 1892.)

Appeal by the plaintiff from an order of the special term denying a motion made by him to continue this action against the trustees of the defendant.

The opinion states the facts.

Backus & Manne, for plaintiff, appellant.

F. A. Ward (*Lowrey, Stone & Auerback*, attorneys), for trustees, etc., respondents.

OSBORNE, J.—In March, 1890, plaintiff brought this action to recover damages for injuries alleged to have been sustained by him, through the negligence of defendant's servants, while a passenger on one of defendant's ferries. The answer of the defendant denied the allegations of the complaint, alleged that plaintiff was a trespasser, and that any injuries he sustained were caused by his own negligence. The defendant was originally organized on November 9, 1854, under the provisions of chapter 135 of the Laws of 1853, for a period of 18 years. Chapter 937 of the Laws of 1867 provided that any corporation theretofore formed might extend its term of existence for a period not exceeding the term for which such corporation was organized in the first instance. Under the provisions of this act, the defendant extended its term of existence for a further period of 18 years, which period expired on November 9, 1890, and thereupon the charter of the defendant expired and the company became extinct. In February, 1891, plaintiff made a motion to continue this action against the persons who were directors of the defendant at the time its charter expired, in their capacity as trustees of the stockholders and creditors of the defendants. This motion was denied, and plaintiff appeals from the order denying said motion.

Title 3, c. 18, pt. 1, Rev. St., marg. p. 600, provides, *inter alia*, as follows: "Sec. 9. Upon the dissolution of any corporation created or to be created, and unless other persons shall be appointed by the legislature or by some court of competent authority, the directors or managers of the affairs of such corporation at the time of its dissolution, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the corporation, collect and

pay the outstanding debts, and divide among the stockholders the moneys and other property that shall remain after the payment of debts and necessary expenses." Sec. 10. "The persons so constituted trustees shall have authority to sue for and recover the debts and property of the dissolved corporation, by the name of the trustees of such corporation, describing it by its corporate name, and shall be jointly and severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall come into their hands." These provisions were adopted from the Revised Laws. By section 4, c. 295, Laws 1832, it was also enacted that "the court in which any suit or proceeding against a corporation which shall have been dissolved by the decree of the court of chancery, or by the expiration of its charter, or otherwise, shall be pending at the time of such dissolution, shall have power, on the application of either party thereto, to make an order for the continuance of such suit or proceeding, and the same may thereafter be continued until final judgment or decree shall be had thereon, which shall have the like effect upon the rights of the parties as if such corporation had not been dissolved." Plaintiff's application in this case would seem to be based upon the course of proceeding prescribed by this statute, and, were it still in force, it would undoubtedly afford ample authority for the granting of plaintiff's motion; but, unfortunately for his contention, this act was repealed by chapter 245 of the Laws of 1880, and no substitute for it has ever been enacted. At common law, originally, all actions *ex delicto* abated on the death of the party by whom or to whom the wrong was done. The Revised Statutes (3 *Rev. St.*, 7th ed., pp. 2394, 2395, §§ 1, 2) provided for the continuance of certain actions for wrongs against the executors or administrators of a deceased wrongdoer; but actions on the case for injuries to the person of the plaintiff, with certain other enumerated causes of action, were expressly ex-

cepted therefrom. If defendant was a natural person, there could be no question that the maxim of *actio personalis moritur cum persona* would apply, and that this action would abate. The learned counsel for the appellant, however, contends that as the plaintiff's claim has always been against the property of the defendant, and that as that property still exists, he should be entitled to prosecute any remedy that he may have against the property. This proposition, we think, cannot be sustained. On the death of an individual tort feasor, his property still exists in the hands of his executors or administrators, and it might, with equal force, be urged that the property of the deceased should be answerable for a claim *ex delicto;* but such is not the law. There is, in our opinion, no distinction between the death of an individual and the dissolution of a corporation *pendente lite* (Sturges *v.* Vanderbilt, 73 *N. Y.* 384, 390). The same rules of law apply, except so far as specially altered by statute, to the motion to continue an action against the legal representatives of one as the other (Bank *v.* Colby, 21 *Wall.* 609; Greeley *v.* Smith, 3 *Story*, 658; May *v.* Bank, 2 *Rob.* [*Va.*] 56). But, even if this were not so, it is a well-settled rule of the common law that the dissolution of a corporation puts an end to an action pending against it (McCulloch *v.* Norwood, 58 *N. Y.* 562).

Plaintiff being, therefore, remediless at common law, the only question left for us to determine is whether there is any statute which has so far altered or modified the common law as to entitle him to the relief that he seeks. The above-quoted sections 9 and 10 are the only provisions of the Revised Statutes relating to the question involved. They constitute the directors of the defendant, in office at the time of its dissolution, trustees of the creditors and stockholders of the defendant, with power to settle the affairs of the defendant, pay outstanding debts, and divide the residuum among the stockholders after the payment of debts and necessary expenses.

Power is also given to sue for and recover the debts and property of the defendant. The duties devolving on the trustees are thus fully set forth, and to them can be added no other or different or additional duties than those prescribed by the statute. They are made trustees of but two classes of persons, to whom alone their allegiance is due, and to whom they are accountable, to wit, creditors and stockholders. Plaintiff not claiming to be a stockholder, can he obtain the benefit of the statute on the ground that he is a creditor of the defendant? We think not; indeed, the learned counsel for the appellant very candidly concedes in his brief that a party who has an action pending for injuries to the person cannot be considered a "creditor," in the legal definition of that word. The cases are numerous, holding that liability for tort is not a debt (Heacock *v.* Sherman, 14 *Wend.* 58; Crouch *v.* Gridley, 6 *Hill*, 250; Kellogg *v.* Schuyler, 2 *Denio*, 73; Esmond *v.* Bullard, 16 *Hun*, 65).

It is, however, sought to bring the plaintiff within the class of persons who might be designated as "creditors," on the theory that defendant contracted with him, as an alleged passenger, to carry him safely, and that his present claim is for damages springing from a breach of such contract. We think the answer to that suggestion is that, in the complaint herein, no contract is alleged, but damages are claimed solely for the carelessness and negligence of defendant's servants by closing a gate upon him, and the action is grounded in tort (Cregin *v.* Railroad Co., 75 *N. Y.* 193). It seems to us, therefore, that the present application of the plaintiff cannot be sustained, as it is without any statutory provision to support it, and the common law is opposed to it. In arriving at this conclusion, we have not been unmindful of the fact that a similar application in another action pending in the supreme court has been granted, after careful consideration, by one of its most learned and painstaking judges, and that his decision has been

affirmed by the general term of the second department, Mr. Justice DYKMAN dissenting. We have carefully gone over the opinion of the special term judge, and the prevailing opinion of the general term (Hepworth *v.* Union Ferry Co. *), and considered the reasons advanced by

*HEPWORTH, RESPONDENT, *v.* UNION FERRY COMPANY, OF BROOKLYN, APPELLANT.

SUPREME COURT, SECOND DEPARTMENT, KINGS COUNTY SPECIAL TERM, OCTOBER, 1891, AND GENERAL TERM, DECEMBER, 1891.

§§ 755 *et seq.*

Revival of action for assault and battery against trustees of corporation upon its dissolution.

An action against a corporation for an assault and battery does not abate upon the dissolution of the corporation, but may be revived and continued against its trustees (DYKMAN, J., dissenting).

(*Decided at special term, October*, 1891, *at general term, December* 14, 1891.)

Motion at special term in Kings county to revive and continue this action against the trustees of defendant.

The opinion states the facts.

James K. Averill, for plaintiff and motion.

B. D. Silliman, for defendant, opposed.

CULLEN, J.—This application is to revive an action against the trustees of the defendant corporation, pending against it, for assault and battery alleged to have been committed by its servants upon the plaintiff, who, it was conceded on the argument, though it does not definitely appear in the papers, was a passenger on defendant's boat. The corporation has determined by the lapse of time provided for its existence in its articles of incorporation. The application is resisted on the ground that the action abated by the death of the corporation, and that the cause of action does not survive. On a similar application made in the city court of Brooklyn, Chief Judge CLEMENT so held the law to be, and denied the application (13 *N. Y. Supp.* 878). With the greatest deference to the views of that learned judge, I feel compelled to dissent from his conclusion. It is conceded that at common law, on the dissolution of a corporation, its personal prop-

them for reaching the conclusions at which they have arrived, but we find ourselves compelled to differ from

erty went to the crown, and its real estate reverted to the grantor, to the corporation. But it is also unquestionable that that rule of the common law never prevailed in this country, but that the assets of the corporation, whether real or personal, remained a trust fund for the benefit of its creditors and its stockholders (Bacon v. Robertson, 18 *How.* 480; Owen v. Smith, 31 *Barb.* 641). Sections 9, 10, tit. 3, pt. 1, c. 18, Rev. St., provide that on the dissolution of a corporation, unless other persons be appointed by the legislature or by the court, the directors or managers of the corporation shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the corporation, collect and pay the outstanding debts, and divide among the stockholders the moneys and other property that shall remain after the payment of debts and necessary expenses; and also shall be jointly and severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall come into their hands. The claim made on behalf of the defendant is that the plaintiff, whose action is for a personal tort, is not a creditor. Strictly speaking, a creditor is one whose claim springs out of contract. In Stewart v. Railroad Co. (90 *N. Y.* 588), a common carrier of passengers was held to be a guarantor against misconduct on the part of its employé to its passenger, and it is said that any such misconduct on the part of the employé is a breach of the contract of the employed. So this liability may be said to spring out of contract. I do not think it necessary, however, to rest this decision on that point. In my judgment, the provisions of the Revised Statutes above quoted should be construed liberally, so as to include the claims of all persons against the corporation arising out of the ordinary conduct of its business. This was the principle adopted by Judge ALLEN in the case of Owen v. Smith (*supra*), where he held that the statute should be regarded as remedial, and construed the word "property," in its popular sense, to include realty as well as personalty. The power given to the trustees by the statute is broad,—"to settle its affairs;" a term comprehensive enough to include all its liabilities. Liability for personal injuries in the operations of large carriers are as much a part of the operating expenses as contract expenditures. So, when a railroad is put in the hands of a receiver, liability for personal injuries occasioned in the operation of the road are charged upon the fund or property in court.

"Nor do I think the rule of *actio personalis moritur cum persona*

them. The order appealed from should be affirmed, with costs.

VAN WYCK, J., concurred.

applies to this case. The defendant was simply an artificial being. The claim which the plaintiff had was in reality against the property and assets of that corporation; it was from that that he was to obtain satisfaction. That property still remains and is in the hands of the defendant's trustees. It certainly would be inequitable to deprive the plaintiff of satisfaction of his claim, if he has one, when, by the voluntary act of the real parties in interest, the stockholders, an end has been put to the corporation, for under the statute its corporate existence might have been continued had the stockholders seen fit to do so. I think, therefore, that it should be held that this cause of action survives, unless there be a controlling authority to the contrary, which I do not find. The decision in McCulloch v. Norwood (58 *N. Y.* 562) is not in point on this question. It was simply to the effect that, after the corporation had been dissolved, no valid judgment could be had against it. Further, under chapter 295, Laws 1832, § 4, it was provided that 'the court in which any suit or proceeding against a corporation which shall have been dissolved by the decree of the court of chancery, or by the expiration of its charter, or otherwise, shall be pending at the time of such dissolution, shall have power, on the application of either party, to make an order for the continuance of such suit or proceeding, and the same may thereafter be continued till a final judgment or decree shall be had therein, which shall have the like effect upon the rights of the parties as if such corporation had not been dissolved.' This remained the law in force until 1880, till the passage of the general repealing act, concomitant with the enactment of the second part of the Code of Civil Procedure. Under the provision of this statute it would seem that this action might have been continued, and claims against corporations for personal torts would not be lost. I do not believe that it was the intention of the Legislature to abrogate such rule, but rather to substitute the mode of procedure for the revival of actions provided for in that Code. Motion granted. Ten dollars costs to abide the event."

From the order entered on this decision, defendant appealed.

B. D. Stillman, for defendant, appellant.

James K. Averill, for plaintiff, respondent.

BARNARD, P.J.—On the 9th of June, 1889, the plaintiff handed to the defendant's ticket-seller, in New York, money for a passage across the river to Brooklyn. The defendant kept this money, refused a ticket, and committed an assault on him, and forcibly put him in the street. The plaintiff commenced an action for the assault in October, 1889. The corporation denied the facts on which the plaintiff based his complaint, and, while the action was at issue and untried, the charter of the defendant expired by its own limitation. The Revised Statutes provide that on a dissolution of a corporation the directors shall be trustees for the creditors and stockholders, with full power to settle the affairs of the corporation. A power to continue the action against the corporation when its charter expired pending an action against it was given by chapter 295, Laws 1832. This law was repealed in 1880, chapter 245, Laws 1880. The tort stands upon the same basis as a contract (Martin *v.* Walker, 12 *Hun*, 46; Ford *v.* Johnston, 7 *Hun*, 563; Baker *v.* Gilman, 52 *Barb.* 26; Lichtenberg *v.* Herdtfelder [*N. Y. App.*] 8 *N. E. Rep.* 526). These cases either hold or approve of the principle that a conveyance made during a pending litigation to defeat the collection of a judgment for a tort can be set aside as if it was a contract debt. In other words, the statute creditor embraces those persons whose claims are based upon torts. The charter pledges the property of the corporation to pay all damages for misfeasance of the company's employés. The law makes the directors trustees to settle the affairs of the corporation, and to pay all debts against the corporation. The court has the power to continue the action which was pending at the dissolution of the corporation of necessity. Such power existed before the act of 1832, and exists since the repeal of 1880. A judgment taken against a corporation whose charter had been amended by decree, and after notice by the attorney for the corporation that he had no further power to appear in the case, was held bad by the court of appeals (McCulloch *v.* Norwood, 58 *N. Y.* 562). In the present case the order makes the statute trustees defendants, and this seems to be the rule recognized in McCulloch *v.* Norwood (*supra*). The order is therefore right, and should be affirmed, with costs and disbursements.

PRATT, J., concurred.

DYKMAN, J. (*dissenting*).—This is an appeal from an order continuing an action for assault and battery against the trustees of an incorporated company after the expiration of the time limited for its continuance in its articles of incorporation. The action was commenced on the 19th day of October, 1889, and the charter of the Union Ferry Company expired by limitation of the time specified in

its charter on the 9th day of November, 1890. On the 23d day of May, 1891, a motion was made at the special term to revive and continue this action against the directors of the corporation who were in office at the time of its dissolution, and an order to that effect was made on the 30th day of July, 1891, from which the defendant has appealed. Under the common law there was no provision for winding up the affairs of a dissolved corporation, but its personal property was forfeited to the crown, and the real property of which it was seized at the time of its dissolution reverted to the grantor. But that severe rule of the common law was unsuited to modern times, and especially to this country, and with us it was ameliorated by our statute as follows: "Upon the dissolution of any corporation created or to be created, and unless other persons shall be appointed by the legislature or by some court of competent authority, the directors or managers of the affairs of such corporation at the time of its dissolution, by whatever name they may be known in law, shall be trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the corporation, collect and pay the outstanding debts, and divide among the stockholders the moneys and other property that shall remain after the payment of debts and necessary expenses" (1 *Rev. St.*, p. 600 §§ 8, 9). Then the law of 1832, to prevent the abatement of suits by or against corporations, was enacted, and while it was in force all suits and proceedings against corporations which had been dissolved, which were pending at the time of such dissolution, could be continued until final judgment, with the same effect upon the rights of the parties as if such corporation had not been dissolved (Laws 1832, c. 295, § 4). But that statute was expressly repealed in 1880 (chapter 245, Laws 1880, p. 369, § 10). It does not appear that any other persons have been appointed either by the legislature or by any court, and we therefore assume that the directors of this corporation at the time of its dissolution are, by virtue of the statute quoted, trustees of the creditors and stockholders of the company, with the powers conferred upon them by the statute. They are, therefore, trustees of the creditors and stockholders of the company, with power to collect and pay the outstanding debts, and divide the money and property which shall remain after the payment of debts and necessary expenses among the stockholders. But they are not trustees of the plaintiff, because he is neither a creditor nor stockholder of the company. The corporation never owed him any money, and nothing was ever due to him from it; and the directors of this company possessed no power to pay him, although they are clothed with ample authority to pay outstanding debts of the corporation. A cause of

NATIONAL EXCHANGE BANK OF BOSTON v. BURKHALTER AND ANOTHER AND SIXTEEN OTHER CASES.

§ 1366.

Execution—return of.

The court may require the return of an execution against the property, notwithstanding sixty days has not elapsed since it was issued, where it appears that there is no property upon which it can be levied and that delay in returning it will injure the plaintiff therein.

(*Decided November* 13, 1892.)

Application for order that sheriff return execution.

The facts are stated in the opinion.

Dill, Chandler & Seymour, for plaintiff and motion.

William E. Stillings, for sheriff, opposed.

INGRAHAM, J.—The affidavit upon which this application is made alleges: "Deponent further says that it is his desire and intention to protect the rights of the several and respective plaintiffs herein, and to enforce the collection of their various judgments aforesaid, by means of a suit in equity to set aside the general assignment as being fraudulent and void, and that, as a prerequisite to bringing the said suit, it will be necessary to have the said executions returned, and, notwithstanding the verbal and written request made by plaintiff's attorneys to the sheriff to return the said executions, he has omitted and declined to return the same, or any of them, and deponent has reason to believe, and alleges, that the rights of the plaintiffs and the judgment creditors represented by him as aforesaid will be impeded and seriously impaired, and they will be placed in jeopardy in

case the return of the executions aforesaid be not speedily had, by reason of the fact that certain other executions have been issued to the sheriff, amounting to a very large sum, which were all subsequent in point of time to the issuance of the several executions in favor of the plaintiffs above mentioned. That deponent apprehends that although the plaintiffs herein, and each of them, are entitled to have the said executions returned forthwith and prior to the return of any of the executions issued after those above mentioned, there is danger, from certain facts and circumstances within deponent's knowledge, that the sheriff may or will return the junior executions issued to him against the property of the said defendants, and upon which certain judgment creditors represented in said junior executions will be in a position to gain an undue and improper and unlawful advantage over the rights of the defendants above named in proceedings to reach the property aforesaid. Deponent further says that, in addition to the tangible property of the judgment debtors claimed by the said assignee, there are also equitable assets amounting, as deponent believes, to several hundred thousand dollars, which deponent desires to reach on behalf of the plaintiffs by means of the suit in equity aforesaid, and the effect of the omission to return the said executions by the sheriff will prevent the plaintiffs from reaching the same in the priority to which they are justly entitled."

The sheriff does not answer this allegation, but simply says that sixty days have not elapsed since the executions were delivered to him; that there are actions pending to set aside the assignment, and if those actions should succeed, and the assignment be declared void, then he would be in a position to realize on the executions in his hands. But the attorneys for the plaintiffs in these actions, and who now make this motion, have requested the sheriff to return the executions, and cannot claim that the sheriff should have held them, and

the court could, in its judgment, provide for the executions. It is apparent that there is no property which can be levied upon to satisfy these judgments. All the judgment debtors' property has been assigned, and the assignee has been found to be entitled to the assigned estate by a sheriff's jury. The plaintiffs have refused to indemnify the sheriff; without such indemnity he does not claim that he would apply this property to the satisfaction of these executions.

There can be no advantage to the sheriff in holding these executions. An execution is the process of the court, issued to enforce its judgment, and is clearly within the control of the court, and the sheriff having failed to answer the allegation before referred to, and it appearing that there can be no advantage to him to hold the executions, it would appear that the protection of the plaintiffs in this action requires that the executions should be returned.

The application should, therefore, be granted.

HOPKINS *et al*, RESPONDENTS, *v.* FREY, IMPLEADED, ETC., APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM; MAY, 1892.

§§ 468 *et seq.*, 481.

Guardian ad litem of infant defendants—failure of to serve answer in action of foreclosure does not invalidate judgment—when quitclaim deed not procured by fraud.

In an action for the foreclosure of a mortgage upon real property the plaintiff is bound to bring infant defendants owning in part the equity of redemption within the jurisdiction of the court,

and see that they are duly served with process, and that a guardian *ad litem* is properly appointed; but his responsibility there ends, and he is not bound to see that such guardian *ad litem* does his full duty to the infant defendants, according to the rules of practice, and the judgment recovered by him in the action is not invalidated by the failure of the guardian *ad litem* of such infant defendants to file a formal answer, that being the only answer he could file, the infant having no defense to the action. The neglect of the guardian to interpose such answer is a mere irregularity which the court will cure by permitting the answer to be filed at any time *nunc pro tunc*.

A referee to sell real property under a judgment in foreclosure is not required to take an oath after his appointment or to give a bond or qualify in any other formal manner, and in an action to set aside such judgment and the sale thereunder, an allegation that he has not taken an oath is immaterial.

In an action in which, among other things, the plaintiff seeks to have a judgment foreclosing a mortgage declared void, allegations in the complaint that the court never acquired jurisdiction of the plaintiffs and that the judgment is void are either characterizations or conclusions and not averments of material fact.

Instance of a case in which it was held that a quitclaim deed, executed by the owners of the equity of redemption of mortgaged premises to cure a possible defeat in the foreclosure, was not obtained by any fraud or false representations.

(*Decided May* 13, 1892.)

Appeal by the defendant from an interlocutory judgment of the New York county special term overruling a demurrer interposed by her to the plaintiff's complaint.

The facts appear in the opinion.

A. R. Dyett (*Townsend, Dyett & Einstein*, attorneys), for defendant, appellant.

I. Newton Williams, for plaintiffs, respondent.

BARRETT, J.—The demurrer brings up the single question whether the complainant states facts sufficient to constitute a cause of action. Stripped of verbiage, the complaint sets forth that in the year 1875 the execu-

tors of one Landgrebe commenced an action in this court for the foreclosure of a second mortgage upon certain property in which the plaintiff, John Everett Hopkins, and his brother Frank Hopkins (since deceased) were interested. John Everett and Frank Hopkins were in fact the heirs-at-law of the mortgagor, Sarah E. Hopkins, who died in the year 1874. The present plaintiff, John Hopkins, was her husband. These heirs-at-law were minors when the mortgage was foreclosed, and the court appointed a guardian *ad litem* for them. The plaintiff there proceeded to judgment, and in October of the same year the property was sold by a referee to Mr. Christopher Fine. In November, 1875, Fine sold the property to the defendant Sanguinetti, who, in the year 1884, conveyed a part of it "by way of gift or sale" to the appellant Frey. It is alleged that the guardian *ad litem* for John Everett and Frank Hopkins did not appear, answer or demur in the foreclosure suit, and that he failed to perform the acts and duties required of him by the statutes and rules of court then in force. This is the only material fact which is alleged as against the foreclosure judgment. All else is either characterization or conclusion, e.g., that the court never acquired jurisdiction as to the minors, and that the judgment was void, etc. The statement that the referee never qualified or took on oath is immaterial, as no oath was called for after his appointment, nor was he required to give a bond or to qualify in any other formal manner. The court acquired jurisdiction by the service of the summons upon the infants, as provided by law, and after such service was completed by the appointment of a guardian *ad litem*. Such is the practice now, and such was the practice in 1875, under the old Code (Code of Procedure, § 134, subdv. 2; *Id.* § 116, subdv. 2). The plaintiff in the foreclosure suit was bound to bring the infants within the jurisdiction of the court, to see to it that they were duly served with process, and that a

guardian *ad litem* was properly appointed. There, however, his responsibility ended. He was not bound to see to it that the guardian thus appointed did his full duty to the infants according to the rules of practice.

If the guardian failed in these particulars, he was liable to his ward, but the judgment of foreclosure was not invalidated by such negligence to which the plaintiff was not privy and which he could not control. There is no averment in the present complaint that the infants were not duly served with the summons as required by law, nor that they had any defense to the action, nor that the judgment of foreclosure could, even with entire diligence, have been avoided. Consequently, it must be assumed that the infants were duly served and that they had no defense.

Thus we have simply the naked fact that the guardian failed to interpose the only answer which he could have interposed, namely, the formal one which submits the rights of the infants to the court. It is upon this slight ground that the plaintiffs now, after the lapse of sixteen years, seek a decree which will enable them to question this foreclosure judgment. The neglect of the guardian to interpose a formal answer, as required by the practice, was a mere irregularity which the court would have cured by permitting such an answer to be filed at any time *nunc pro tunc* (Althause *v.* Radde, 3 *Bosw.* 410; and see Croghan *v.* Livingston, 17 *N. Y.* 218, and Crouter *v.* Crouter, 44 *St. Rep.* 315).

The case made by the complaint is, however, weaker than if it were a direct attack upon the foreclosure judgment. It is further alleged that in May, 1883, and after John Everett and Frank Hopkins became of age, the defendant Sanguinetti secured from them a quitclaim deed of this same property in consideration of a trifling sum of money, and it is this quitclaim, not the foreclosure judgment, which is here sought to be set aside. The plaintiffs charge that the quitclaim was obtained from

them by fraud, in that Sanguinetti represented that they had no interest in the property; that their rights had been cut off by the foreclosure in 1875; that she, Sanguinetti, was about to sell the property; that it was necessary to correct some clerical error in the foreclosure proceedings which the court would do without the signatures of John Everett and Frank Hopkins, but that this would take a little time and that she would pay $100 to avoid the delay and to secure the same end by their release. They agreed to this, took the money and signed the quitclaim. This is characterized as a fraud, and the representations are alleged to have been untrue. But the fact is quite the reverse. Every word Sanguinetti uttered was true, and if the plaintiffs had taken the trouble to look at the record they would have seen that what she said was quite accurate. Her facts were true even if she erred in her legal conclusions. The plaintiffs now say that they did not discover the falsity of her representations until 1891, but they do not tell us why they failed to make this easy discovery (that is, easy, if the representations were untrue) for upwards of eight years. The record, which was the basis of the whole story, was in existence when Sanguinetti spoke, and it has been in existence ever since.

The record, so far as appears from any averment in this complaint, really disclosed the truth of Sanguinetti's statement, but were it otherwise, the Hopkins brothers were no longer minors when they were asked to sign the releases. They were then men of full age, and had the same opportunity as Sanguinetti to determine whether the judgment of foreclosure was valid or invalid. It is clear, therefore, that no fraud, as matter of fact, and as distinguished from adjectives and idle invective, is charged with regard to either the foreclosure proceedings or the release. None upon Sanguinetti's part. None upon her transferees', who became transferees in reliance upon the recorded quitclaim. As to

these transferees, not even notice of any alleged fraud in procuring the quitclaim is alleged. The complaint fails to state facts tending to constitute a cause of action, and it is wholly without merit.

The interlocutory judgment should, therefore, be reversed, with costs, and an interlocutory judgment granted sustaining the demurrer, with costs, with leave to the plaintiffs to amend their complaint within twenty days, if so advised, upon payment of the costs of the special and general terms.

VAN BRUNT, P.J., and O'BRIEN, J., concurred.

THOMPSON *v.* STANLEY.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY SPECIAL TERM; JULY, 1892.

§§ 1010, 1023.

Decision—form of, on determination of issue of law—requests to find.

Where an issue of law raised by a demurrer is determined, the decision of the court, in writing, must be filed in the clerk's office within twenty days after the final adjournment of the term where the issue was tried; no order for judgment is necessary or proper, nor can it take the place of such a decision in writing. Where an order overruling or sustaining the demurrer and directing the judgment to be entered is made, it is irregular, and should be vacated.

The decision of the court filed on determining a demurrer should direct the final or interlocutory judgment to be entered, but it should not direct as to both.

Village of Palmyra v. Wynckoop (17 *N. Y. Civ. Pro.* 187) followed.
The party defeated upon the trial of an issue of law is not entitled to have requests to find made by him passed upon; section 1023 of the Code of Civil Procedure, providing for the making and disposition of requests to find, does not apply to the trial of an issue of law, and even if it did, they would be submitted too late to entitle them to be passed upon where they were submitted on a date fixed for the signing of the decision, and after the determination of the trial justice was announced.
(*Decided July 22 and 27, 1892.*)

Motion by defendant Stanley that an order entered in this action overruling her demurrer to the complaint herein be vacated and set aside.

This action was brought against Annie Stanley, as administratrix of David A. Stanley, deceased, and the Harris and Dew Faucet, Plug and Bung Company, by the plaintiff, as a stockholder of said company, in behalf of himself and of such other stockholders of the defendant corporation as may come in and contribute to the prosecution thereof, to recover moneys and properties belonging to the corporation, alleged to have been misappropriated by the decedent David A. Stanley while its president and having control thereof. The defendant Annie Stanley, as administratrix, demurred to the complaint on the ground (1) that it did not state facts sufficient to constitute a cause of action; (2) that the plaintiff has no legal capacity to sue in that he is not a stockholder of the defendant corporation, and has no interest in, title to or lien upon its assets or property; (3) that several causes of action have been improperly united.

Her demurrer was overruled and an order entered directing "that said demurrer be and the same hereby is overruled, with costs to the plaintiff, and that said plaintiff have judgment thereof, but with leave, however, to said defendant Annie Stanley, as administratrix, etc.,

to answer in this action within twenty days upon payment of costs : that said costs be adjusted by the clerk of this court, and that thereupon an interlocutory judgment be entered herein, which shall direct that said demurrer is overruled, with costs to the plaintiff Beverhout Thompson; and that in case of the failure of the defendant Annie Stanley, as administratrix, etc., to answer said complaint within twenty days after the service of said interlocutory judgment upon her attorney, and to pay said costs so awarded as aforesaid, to be adjusted, and to be included in such interlocutory judgment to said plaintiff's attorney, then let the said plaintiff have final judgment against the said defendant Annie Stanley, as administratrix, etc., said final judgment to be settled by this court on eight days' notice."

This order was entered June 24, 1892, and thereafter the defendant Stanley's attorneys moved that said order be vacated, "on the ground that it was irregularly entered in that the decision upon a demurrer is not properly made by an order, but should be made by conclusions of law in writing signed by the judge before whom the case was tried."

Charles A. Seymour (*Dill, Chandler & Seymour*, attorneys), for defendant Stanley and motion.

L. Kargé, for plaintiff, opposed.

ANDREWS, J.—It has been a very common practice for the prevailing party, after the trial of an issue of law, to enter an order sustaining or overruling the demurrer, and giving the defeated party leave to serve a new pleading. This practice is clearly wrong, for section 1010 of the Code expressly declares that upon a trial by the court of an issue of fact, or of law, its decision, in writing, must be filed in the clerk's office, within twenty days after the final adjournment of the

term where the issue was tried. And in Village of Palmyra *v.* Wynckoop (17 *N. Y. Civ. Pro.* 187) it was held that there could be no judgment upon a demurrer, either final or interlocutory, without such a decision in writing of the issue or issues; and that no order for judgment was necessary, nor could such order take the place of such decision in writing, by the court.

It follows that the order entered in this case was unwarranted and irregular, and should be vacated. Counsel for the defendants has submitted a proposed form of decision, which directs both an interlocutory and final judgment. Section 1021 provides that the decision of the court must direct the final or interlocutory judgment, but does not provide that it must direct both judgments; and the attorney for the plaintiff may submit a decision in such form as he thinks should be entered, and also an order vacating the order heretofore entered.

The papers may be resubmitted to me at Chambers, on July 27.

On the date named in the above decision for the resubmission of the papers, July 27, 1892, the attorneys for the respective parties appeared before the justice, and the plaintiff submitted the proposed decision, and the defendant submitted requests to find upon which the justice indorsed the following memorandum.

ANDREWS, J.—The within requests are not passed upon—1st, because section 1023 of the Code does not apply to the trial of an issue of law; and 2d, if it does apply, they are submitted too late. Order vacating and setting aside order of June 24, 1892, overruling demurrer, signed. Decision signed.*

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* The findings ultimately made by the court on the determination of the demurrer referred to in the above opinion read as follows:

SUPREME COURT, NEW YORK COUNTY.

BEVERHOUT THOMPSON, PLAINTIFF, v. ANNIE STANLEY, AS ADMINISTRATRIX OF DAVID A. STANLEY, DECEASED, AND THE HARRIS AND DEW FAUCET PLUG AND BUNG COMPANY, DEFENDANTS.

The defendant Annie Stanley, as administratrix of David A. Stanley, deceased, having demurred to the complaint herein on the grounds that said complaint does not state facts sufficient to constitute a cause of action, that the plaintiff has not a legal capacity to sue, and that several causes of action have been improperly united, said demurrer having come duly on to be heard—now, after hearing Frederick Seymour, Esq., of counsel for the said defendant, in support of said demurrer, and L. Kargé, plaintiff's attorney, in opposition thereto, and after reading the complaint herein filed April 15, 1892, and upon reading and filing said demurrer, and upon due deliberation thereon, I do make the following conclusions of law:

1. That the complaint herein states facts sufficient to constitute a cause of action.

2. That the plaintiff has legal capacity to sue.

3. That several causes of action have not been improperly united in said complaint.

4. That none of the grounds of demurrer assigned by the defendant Annie Stanley are well taken.

5. That the plaintiff is entitled to judgment overruling said demurrer, with costs, which are hereby awarded to plaintiff to be paid by said defendant to plaintiff, but with leave, however, to said defendant to answer the plaintiff's complaint herein within twenty days, upon payment of costs.

And I hereby order and direct that said costs be adjusted by the clerk of this court, and that an interlocutory judgment be entered herein which shall direct that said demurrer is overruled, with costs to the plaintiff, to be paid by the defendant Annie Stanley, as administratrix of David A. Stanley, deceased, but with leave, however, to said defendant Annie Stanley to answer the complaint herein within twenty days after the service of said interlocutory judgment upon her attorney, supon the payment by her to plaintiff's attorney within twenty days of said costs, so to be adjusted as aforesaid, and to be included in said interlocutory judgment.

Dated NEW YORK, July 27, 1892.

GEORGE P. ANDREWS,
Justice Supreme Court.

FRANK, APPELLANT, *v.* DAVIS, RESPONDENT.

COURT OF APPEALS; OCTOBER, 1892.

§ 1626 *et seq.*

Action to foreclose mortgage—when judgment for deficiency may be granted therein after sale of mortgaged premises under prior mortgage.

Where, pending an action for the foreclosure of a mortgage upon real property, the mortgaged premises were sold under a prior mortgage in an action to which the holder of the junior mortgage was a party, and a surplus remained which in appropriate proceedings was applied upon the junior mortgage, leaving unpaid upwards of $3000,—*Held*, that the deficiency arising upon the foreclosure of the junior mortgage was thereby ascertained, and that, although there could not be a sale under such junior mortgage, the lien thereof was transferred to the surplus moneys, and upon its being applied on such mortgage the deficiency was ascertained and a court of equity had power to give a personal judgment therefor.

By the statute of this state permitting a judgment for deficiency in an action for the foreclosure of a mortgage, the general rule of equity that where a court of equity obtains jurisdiction of an action, it will retain it and administer full relief, both legal and equitable, so far as it pertains to the same transaction or the same subject-matter, was made applicable to actions to foreclose mortgages on real property, and the rule that existed prior to the Revised Statute, that in an action to foreclose a mortgage the court had not jurisdiction to render a personal judgment against the mortgagor upon his bond or covenant, was entirely swept away.

Frank *v.* Davis (21 *N. Y. Civ. Pro.* 374) reversed.

(*Decided October*, 1892.)

Appeal by the defendant from a judgment of the general term of the supreme court, in the first department, reversing a judgment of the special term of that court, denying an application made by the plaintiff for a judgment of deficiency in an action for the foreclosure of a mortgage.

This action was brought to foreclose a mortgage upon real property situate in the city of New York, and the complaint demanded judgment for the relief usually sought in such an action—to wit, the sale of the property mortgaged, the application of its proceeds to the amount due on the mortgage, and judgment against the defendant, the mortgagor, for any deficiency. Upon trial duly had at special term, the plaintiff recovered a judgment, which was affirmed at general term (6 *N. Y. Supp.* 144) and also by the court of appeals (127 *N. Y.* 673); pending this appeal a judgment was entered in an action to foreclose a prior mortgage upon the same property, directing the sale of such property, under which a sale was had, which resulted in the payment of the first mortgage, and in a surplus of about $4000; this surplus was applied, in surplus-money proceedings brought for that purpose, upon the mortgage in favor of the plaintiff herein, and after the application of such surplus there remains owing the plaintiff upon his mortgage upwards of $3000. The plaintiff moved at special term for an order directing the clerk to enter and docket judgment in his favor for the amount of such deficiency, and such order was duly granted; the defendant appealed therefrom to the general term of the supreme court, in the first department, and the order of the special term was there reversed (21 *N. Y. Civ. Pro.* 374), and this appeal taken from such order.

Julius J. Frank, for plaintiff, appellant.

Benjamin N. Cardoza (*Donohue, Newcombe & Cardoza*, attorneys), for defendant, respondent.

EARL, C.J.—The judge at special term granted plaintiff's motion upon the authority of the case of Siewert *v.* Hamel (33 *Hun*, 44). The general term disapproved of the decision in that case, and held that the jurisdiction of an equity court to enter a deficiency judgment in an action to foreclose a mortgage is strictly statutory, and that such a judgment can be entered only after a sale under the foreclosure judgment, and a deficiency thus resulting and ascertained.

In England, and in this state prior to the Revised Statutes, the court of chancery, in an action to foreclose a mortgage, was not supposed to have jurisdiction to render a personal judgment against the mortgagor upon his bond or covenant to pay the mortgage debt, and such a judgment could only be obtained by an action at law (Noonan *v.* Lee, 2 *Black.* 499, 501; Orchard *v.* Hughes, 1 *Wall.* 73; Dunklay *v.* Van Buren, 3 *John. Ch.* 330; Jones *v.* Conde, 6 *John. Ch.* 77; Globe Ins. Co. *v.* Lansing, 5 *Cow.* 380; Sprague *v.* Jones, 9 *Paige*, 395; Equitable Life Ins. Soc. *v.* Stevens, 63 *N. Y.* 341, 344; Burroughs *v.* Fostevan, 75 *N. Y.* 567, 572). This was an exception to the general rule that where a court of equity obtains jurisdiction of an action it will retain it and administer full relief, both legal and equitable, so far as it pertains to the same transactions or the same subject-matter (Lynch *v.* The Elevated Railroad Co., 129 *N. Y.* 274; McGean *v.* The Same, recently decided in this court). The purpose of this rule was to relieve parties from the expense and vexation of two suits, one equitable and the other legal, where the whole controversy could be adjusted in the one suit. There was no reason, so far as we can perceive, for taking the case of a mortgage foreclosure out of this convenient and beneficial rule; and the law-makers of this state took

early occasion to change the law by providing that a personal judgment for a deficiency may be given in the foreclosure action against any party liable for the mortgage debt (2 *R. S.* 191, secs. 151, 154). They went further than the equitable rule, and authorized a personal judgment not only against the mortgagor, as to whom equitable relief could be had, but also against any other person who was obligated for the payment of the same debt.

It was early held that a contingent decree for the payment of the deficiency could be made before the sale under the foreclosure judgment (McCarthy *v.* Graham, 8 *Paige*, 480).

The position taken by the defendant (in which the court below sustained him) is extremely technical. It was provided in the Revised Statutes that a personal judgment against the mortgagor might be ordered "for the balance of the mortgage debt that may remain unsatisfied after a sale of the premises," and the Code is substantially the same (sec. 1627). His claim is that as there has been and could be no sale upon the judgment in this action, the deficiency could not be ascertained in the mode mentioned in the statute, and that, therefore, a deficiency judgment is unauthorized, and that the plaintiff must bring an action at law to obtain such a judgment.

The purpose of the provisions contained in the Revised Statutes and re-enacted in the Code was to change the chancery rule, as it had before been understood, and to bring the practice in foreclosure actions within the general chancery rule above referred to, and even, as we have seen, to extend that rule. The deficiency was to be ascertained by a sale of the mortgage premises, and not by the estimates of witnesses or other less satisfactory evidence. We are asked to hold that enough of the old chancery rule is left to prevent a deficiency judgment unless the deficiency be ascertained by a sale in the ac-

tion in which the judgment is asked. We think we are justified in holding that that rule has been entirely swept away, and that the general rule in equity practice above referred to, except as it is modified by the provisions of the Code, governs foreclosure as other equitable actions. Where there is a sale under the foreclosure judgment, and after the application of the proceeds there is a balance unpaid upon the mortgage, the deficiency is thus ascertained. But the full purpose of the statute has been accomplished if the deficiency be ascertained, as in this case, by a sale in an action to foreclose a prior mortgage to which the defendant was a party.

The surplus arising from the sale under the prior mortgage is, as to this plaintiff, for the purpose of the lien of his mortgage to be treated as real estate (Moses *v.* Murgatroyd, 1 *John. Ch.* 119; Dunning *v.* The Ocean National Bank, 61 *N. Y.* 497). The surplus money took the place of the real estate, and the plaintiff's lien was transferred to that. He could not sell it under his judgment, but he had the right to have it applied upon his judgment, and such application took the place of and was in lieu of a sale of the real estate. The deficiency was thus ascertained, and we cannot hold that a court of equity could not, in such a case, give a personal judgment for the deficiency without going against the prevailing practice under the general rule above referred to, without unnecessarily shortening the arm of equity and sacrificing substance for mere form. The plaintiff properly obtained his equitable judgment, and as part of the relief to which he is entitled, to do complete justice between the parties, he should have the deficiency judgment which he asks.*

* In Dudley *v.* Congregation of Third Order of St. Francis (*ante*, p. 380) the general term of the supreme court, in the first department, holds that where a mortgage is found in an action to foreclose it to be void, the plaintiff cannot have judgment, as in a common-law action, on the bond.

The order of the general term should be reversed and that of the special term affirmed, with costs in this court and the supreme court.

All concurred.

HORN, AS TRUSTEE, ETC., RESPONDENT, *v.* TERRY, APPELLANT.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM; JUNE, 1892.

§ 3191.

Appeal from city court of New York to court of common pleas—when dismissed because case contains no copy of general term judgment or contains defective return—agreement to pay wife weekly sum in consideration of withdrawal of suit for separation.

It seems that in an action brought by the trustee named in an agreement whereby a husband agreed to pay a stated sum weekly for the use of his wife in consideration of her withdrawal of a suit for separation and abandonment of alimony awarded her, which sum was to be applied by her to such uses as she saw fit, and not to be accepted in discharge of his obligation to provide for her support, evidence to show that the wife denied the husband his conjugal rights is not pertinent and is properly excluded.

Where, upon an appeal to the court of common pleas from a judgment of the general term of the city court of New York, the case does not contain the judgment of the general term, the appeal must be dismissed, there being nothing before the court to review.

Horn v. Terry.

The rules of the general term of the court of common pleas provide that the rules of the court of appeals governing appeals to that court shall apply to appeals made to it from the city court, and the rules of the court of appeals require that the case on appeal shall contain a copy of return of the clerk of the court from which the appeal is taken, and where an appeal from the general term of the city court of New York to the court of common pleas is defective in omitting a judgment of the affirmance upon which the authority of the court to proceed is dependent, the appeal must be dismissed.

(*Decided June*, 1892.)

Appeal from an order of the general term of the city court of New York affirming a judgment of the trial term of that court entered in favor of the plaintiff upon a verdict directed by the court.

The facts appear in the opinion.

E. R. Terry, for defendant, appellant.

T. C. Campbell, for plaintiff, respondent.

BISCHOFF, J.—The question whether or not the wife's denial of her husband's conjugal rights deprives her of the right to his support was in no sense pertinent to the case at bar, since the weekly sum sought to be recovered in this action, and which defendant had agreed to pay in consideration of his wife's withdrawal of her suit for a separation and the abandonment of the alimony awarded her, was to be applied by her to such uses as she saw fit, and not to be accepted in discharge of his obligation to provide for her support; hence the trial justice properly refused to receive the evidence excluded, and the appeal from the judgment is without merit.

The absence of the judgment of affirmance of the general term of the court below from the case submitted

to us on this appeal, however, precludes us from an affirmance of that judgment. Rule II. of the general term rules of this court provides that the rules of the court of appeals governing appeals to that court shall apply to appeals from the city court to this court; and Rule V. of the court of appeals requires that the case on appeal shall contain a copy of the return of the clerk of the court from which the appeal is taken. If, therefore, we assume that the case submitted complies with the rules above mentioned, there is nothing before us for review, since, pursuant to sec. 3191 of the Code of Civil Procedure, we may only entertain appeals from the city court when they are taken from "actual determinations" of that court made at a general term thereof.

On the other hand, if it is urged that the case submitted is defective in that it does not contain a copy of the clerk's return and omits the judgment of affirmance upon which our authority to proceed is dependent, then consistency with the rules established for the orderly transaction of judicial business and the avoidance of any appearance of having affirmed a spurious judgment require that this appeal be dismissed (Bastable *v.* Syracuse, 72 *N. Y.* 64).

Appeal dismissed, with costs.

DALY, C.J., concurs.

JEPSON, RESPONDENT, *v.* POSTAL TELEGRAPH CABLE CO.

COUNTY COURT OF CATTARAUGUS COUNTY; JULY, 1892.

§§ 431, 2879.

Service of summons on corporation—who is not managing agent.

A telegraph operator who has charge of the placing of wires in certain defined sections under an order of a chief operator is not a managing agent of a telegraph corporation by whom he is employed, within the meaning of the provisions of the Code of Civil Procedure relative to the service of a summons upon a corporation, and the corporation represented by him cannot be served by delivering the summons to him.

Reddington *v.* Mariposa, L. & M. Co.' (19 *Hun*, 405), followed.

Instance of an action to recover damages for injuries to plaintiff's trees, in which the evidence was not sufficient to show that the defendant had inflicted the injuries.

(*Decided July*, 1892.)

Appeal by defendant from a judgment rendered against it in a justice's court.

The opinion states the facts.

T. H. Dowd (*R. H. Guernsey*, attorney), for defendant, appellant.

V. C. Reynolds, for plaintiff, respondent.

VREELAND, J.—The appellant raises the preliminary question that the summons was not properly served.

The return shows that the summons was served upon

one Benton E. Weaver, who was a telegraph operator having charge of the company's local telegraph office in the village of Salamanca. The constable who served the summons returned that Weaver was a "managing agent" of defendant, but from the affidavits read by the defendant, and the papers submitted on the argument by plaintiff, it is plain that Weaver was in no sense of the term a "managing agent." By section 431, Code Civil Proc., a summons may be served upon the president and other officers of a corporation, or upon a managing agent. Section 2879 applies the provisions of section 431 to actions in courts of justices of the peace. A defect appears to exist in the statute, in making no provision for the service of a summons upon such a corporation as is the defendant, in cases where none of the persons named in section 431 reside within the jurisdiction of a justice's court. While the proceedings do not show such a state of facts to exist in this case, it is probably true that plaintiff could begin her action in no other way. The service upon Weaver appears to have given the justice no jurisdiction over the defendant. In the papers submitted by the plaintiff, Weaver represents himself as being a telegraph operator for defendant, with an office on Main street, in Salamanca, having charge of the wires, putting up and keeping in repair, in a certain defined section of country, under the orders of the chief operator. The meaning of the term "managing agent" has been clearly defined is several decisions, both in section 431 and section 432. In Reddington *v.* Mariposa, L. & M. Co. (19 *Hun*, 405), the opinion reads: "It is quite clear that the legislature attached importance to the term 'managing agent,' and employed it to distinguish a person who should be invested with general power, involving the exercise of judgment and discretion, from an ordinary agent or employé, who acted in an inferior capacity and under the direction and control of superior authority, both in regard to the extent of the

work and the manner of executing the same." This case was under section 432 of the Code, but the words "managing agent" have the same meaning, and are used in the same sense, in each section. To the same import is Winslow *v.* Transit Co. ([Sup.] 4 *N. Y. Supp.* 169).

It is more than doubtful if the evidence offered by plaintiff upon the trial was sufficient to authorize any judgment whatever. It seems likely that some persons in the employ of defendant, in the work of stringing wires for the telegraph line, wantonly mutilated some shade trees growing in the highway in front of plaintiff's residence; but the evidence entirely fails to point out the persons who did the mischief, or to connect them with the defendant. The only evidence of the injury was given by Clarence Jepson, a son of plaintiff, who testified to a conversation with Weaver, the agent, about defendant cutting them off (meaning the trees), and that Weaver had told him that they had cut the trees down. It may be fairly assumed that the witness intended to say that some persons in the employ of defendant cut the trees, but he fell far short of so saying. Besides, the declarations of Weaver were not admissible to bind the defendant. He was simply an employé, not even shown to have been connected with the cutting, or to have had any personal knowledge as to who did it. It may be that the injury complained of was wilful and unlawful, but for the reasons stated the recovery cannot be sustained.

The judgment is reversed.

GLINES *v.* SUPREME SETTING ORDER OF IRON HALL.

SUPREME COURT, FIRST DEPARTMENT, SPECIAL TERM; OCTOBER, 1892.

§§ 432, 1810.

Service of summons on foreign corporation—when proof of insufficient—jurisdiction of court to appoint receiver of corporation in action against it.

Where service of summons in action against foreign corporation is made upon a person alleged to be its managing agent, it should appear in the proof of service that diligent effort has been made to serve the president, secretary or treasurer of the defendant, and that they could not with due diligence be found within the state.

In proving the service of a summons in an action upon a foreign corporation by delivering it to its managing agent within the state, facts from which it shall appear to the court that the party served is in fact a managing agent of the defendant should be shown, and it is not sufficient merely to state in the affidavit of service that the person so served was a managing agent of the defendant, which is a statement merely of a conclusion.

Where, in an action brought to prevent funds of a foreign corporation from being taken away from the state to the detriment of resident members, the court has jurisdiction of the subject-matter of the action, and the facts proving the necessity for the exercise of the court's power to appoint a temporary receiver of the corporation, it has jurisdiction to appoint such a receiver and may do so *ex parte* and without notice, and its right to do so is not dependent upon the court acquiring jurisdiction over the person of the defendant.

People *ex rel.* Railroad Company (7 *Abb. N. S.* 290) followed.

(*Decided October* 5, 1892.)

Motion by the defendant to vacate an order appointing the plaintiff temporary receiver of the property of the defendant in this state.

This action was brought by the plaintiff, under the provisions of § 1781 of the Code of Civil Procedure, to prevent removal from the state of property of the deendafnt corporation to which the plaintiff, as a member of the corporation, claimed to be entitled.

Other facts appear in the opinion.

Thomas L. Arms (*Agar, Ely & Fulton*), for defendant and motion.

Morse, Koones & Findlay, for plaintiff, opposed.

O'BRIEN, J.—This motion is made to vacate an order, granted on August 26, appointing a receiver, on the ground that the court was without jurisdiction. The motion is made on the papers, which include the summons, complaint, affidavit and order to show cause, which were the basis of the order appointing the receiver. From such original papers it appears that the defendant is a foreign corporation, and the affidavit of service states that the papers were served on the defendant "by delivering a copy of the same to C. H. Cooper, the deputy supreme justice of the defendant for this district, and the defendant's managing agent in this district, and leaving the same with him, and at the same time showing him the original of said affidavit and order. Deponent further says that he knew the person served as aforesaid, to be the said C. H. Cooper, the deputy supreme justice and managing agent of the defendant herein; that deponent was informed by the deputy superintendent of insurance of this state that the defendant had no right to do business in this state, and had made no designa-

tion of any one on whom to serve papers." Another of the original papers is an affidavit made by one Norris, who states, in effect, that he is a member of one of the local branches, and is acquainted with the deputy supreme justice, C. H. Cooper, "who has been for several years an appointee of the supreme justice, Somerby, who has been the chief officer of the defendant for several years past. Said Cooper is the deputy supreme justice in charge of this district, composed of New York and Kings county, this state, and the representative and agent of the defendant in said district." That while calling upon said Cooper the latter "produced a letter which contained a telegram received from a member of the finance committee of this defendant, in words as follows: 'Secure New York membership; act promptly; hold all moneys; look for a communication; call a meeting of all trustees the first of the week.'—which the said Cooper declared he understood as instructing him to warn the trustees of all local branches to secure the reserve fund at once, and place it where a receiver could not find it were a receiver appointed, and that he was about to proceed accordingly to notify the said trustees. That he had sent a letter to the trustees of the various local branches in his district covering the instructions heretofore referred to. He further stated that the aforesaid telegram was practically from said Somerby; it was sent by a man who was so near Somerby that it meant Somerby, and he was acting as if it was from Somerby." Upon the summons and complaint and affidavits, showing that necessity existed for securing and preserving the assets, and the defendant having made default in appearing upon the return day of the order to show cause why a receiver should be appointed, an order appointing a receiver was made. And the question thus presented is whether the affidavit of service and the other papers were sufficient to confer jurisdiction upon the court to make the order.

Code, § 432, provides in what manner service shall be made upon a defendant being a foreign corporation. By the first subdivision of this section it is provided that service may be made upon the president, treasurer or secretary; by the second, by a person designated for the purpose in writing; and by the third subdivision it is provided: "If such a designation is not in force, or if neither the person designated nor an officer specified in subdivision first of this section can be found with due diligence, and the corporation has property within the state, or the cause of action arose therein, to the cashier, a director or managing agent of the corporation within the state."

Upon an examination of the affidavits given at length above, the service was clearly defective, because it did not therein appear—*first*, that, the president, treasurer or secretary of the defendant could not be found with due diligence in the state; and, *second*, it does not appear that C. H. Cooper was in fact a managing agent of the defendant. With respect to the first, a perusal of the papers will show that no facts are stated from which the court could conclude that any diligence was exercised for the purpose of serving the summons and complaint upon the president, treasurer or secretary. As to the second objection, it is true that the person serving the papers states that Cooper was the managing agent of the defendant. This, however, is a mere statement of his conclusion as to what Cooper's position with the defendant is, and there is nothing in the papers from which the court itself could draw any such conclusion. If, however, we give the affidavit of Norris a construction most favorable to the plaintiff's view, it fails to show that the person served was a "managing agent" within the designation of that term as used in the Code. In Reddington *v.* Mariposa, L. & M. Co. (19 *Hun*, 405, 408), it is said: "It is quite clear that the legislature attached importance to the term 'managing agent,' and employed

it to distinguish a person who should be invested with general power, involving the exercise of judgment and discretion, from an ordinary agent or employé who acted in an inferior capacity, and under the direction and control of superior authority, both in regard to the extent of the work and the manner of executing the same. That service, to be rendered effectual, . . . must be made upon one of the officers specified therein, or upon a person whose powers and duties correspond to the term 'managing agent,' as we have endeavored to define it." In answer to the motion to vacate the order appointing the receiver, as the papers upon which the order was made did not show service upon the defendant, it was sought to cure this defect by supplemental affidavits,—although it is doubtful if any such papers were proper,—showing that Cooper was either a managing agent or a director of the defendant, and therein facts were presented from which the court was asked to so conclude. In addition, it was made to appear that since the order appointing the receiver was made, and after the granting of the order to show cause to vacate the order appointing the receiver, the defendant appeared in the action and answered.

What effect the subsequent appearance and the putting in of an answer by the defendant would have upon the validity of the service, for the purpose of obtaining jurisdiction over the person of the defendant, it is unnecessary to discuss, in view of the conclusion at which I have arrived as to the validity of the order. No question is presented on this motion as to the necessity for the appointment of a temporary receiver, and the facts upon which the plaintiff moved, showing the necessity for the immediate appointment of a temporary receiver, are not placed in dispute. It is practically conceded to have been a case eminently proper for the immediate appointment of a temporary receiver, to the end that funds in this state might not be removed therefrom by persons who had

been shown to have squandered the funds of the order received from branches in this state. In such fund the members of the order here claim to have title and interest, and the action was brought after the appointment of a receiver in Indianapolis, to prevent the funds here being taken away, to the injury and detriment of members residents of our own state. If, under such circumstances, the power to appoint a receiver was dependent upon the court having obtained jurisdiction over the person of the defendant, which is the ground upon which the moving parties solely rely to obtain a vacation of the order appointing a receiver, then I should be inclined to think that, the service upon the person being defective, the order itself could not be upheld. Upon reading, however, the section of the Code, and having in mind the jurisdiction exercised by the supreme court, it is clear that the right and power of the court to appoint a receiver in the first instance, *ex parte* and without notice, are abundant. Such right is not dependent upon the court having acquired jurisdiction over the person of the defendant; it being sufficient that, having jurisdiction over the subject-matter, the facts presented show the necessity for the exercise of the court's undoubted power. Such power should be cautiously exercised, and therefore the general rule is to give notice to the defendant of such applications. The validity, however, of an order appointing a receiver is not dependent upon notice to, or upon the court's obtaining jurisdiction over, the person of the defendant.

In People *v.* Railroad Co. (7 *Abb. Pr.* [*N. S.*] 290) it is said: "In Verplanck *v.* Insurance Co. (2 *Paige*, 450), Chancellor WALWORTH states the rule as follows: 'By the settled practice of this court in ordinary suits, a receiver cannot be appointed *ex parte* before the defendant has had an opportunity to be heard in relation to his rights, except in those cases where he is out of the jurisdiction of the court, and cannot be found, or where, for

some other reason, it becomes absolutely necessary for the court to interfere before there is time to give notice to the opposite party to prevent the destruction or loss of property.' The same rule is reasserted by the chancellor in Sandford *v.* Sinclair (8 *Paige*, 374) and in Gibson *v.* Martin (*Id.* 481), and is asserted in numerous cases, among which are Field *v.* Ripley (20 *How. Pr.* 26), McCarthy *v.* Peake (9 *Abb. Pr.* 166), and Dowling *v.* Hudson (14 *Beav.* 423). In the case of Verplanck *v.* Insurance Co. (*supra*), the chancellor also said that 'in every case where the court is asked to deprive the defendant of the possession of his property without a hearing, or an opportunity to oppose the application, the particular facts and circumstances which render such a summary proceeding proper should be set forth in the bill or petition on which application is founded.'" Upon the papers, I think such a case was here presented, it having been shown that there was danger of the assets being removed, and the exigency demanding the immediate appointment of a temporary receiver, with a view to hold the property and preserve it for residents here claiming title thereto.

No suggestion is made in regard to the fitness or unfitness of the person selected as receiver, nor as to the amount of security given by him. He was appointed on his own application, and without the court having any facts before it showing that his appointment was not in all respects proper. If any reasons exist why he should not be retained in that position, or upon its being shown that the assets are largely in excess of what was represented upon the original motion, thus demanding that additional security should he given by the receiver, these can only be considered when presented upon proper motions. This motion to vacate the order is based exclusively upon the ground that, the court not having jurisdiction of the person of the defendant, the order appointing the receiver was a nullity; and, having reached the conclusion that this view is not correct, the motion, for that reason alone, must be denied.

INDEX

ABATEMENT AND REVIVAL—Security for costs may be required as condition of reviving action in equity against executrix of deceased defendant 161
—— Right to revive suit in equity after death of sole defendant not absolute and unqualified..... 161
—— Action for personal injury caused by negligence of servants of a corporation abates on its dissolution *pendente lite*, and may not be continued against its trustees..... 402
—— The rule at common law and under the statute stated..... 402
—— Action for assault and battery brought against corporation does not abate upon its dissolution *pendente lite*, but may be revived and continued against its trustees.....407 *note*
ACCOUNTING—When court of common pleas has jurisdiction of action for, of executors and trustees..... 149
AGENCY—Is a fiduciary-capacity relation, and property received by an agent is received in a fiduciary capacity, and if it is turned into money, that also is received in a fiduciary capacity..... 126
ALLOWANCE—See COSTS.
AMENDMENT—What defects in mandate may be cured by amendment..... 105
—— See PLEADING.
APPEAL—Answers to questions contained in commission which have been excluded need not be contained in case to entitle party proposing to read them to review on appeal..... 247
—— When determination on, from order vacating injunction decisive on appeal from judgment..... 1
—— Order of surrogate directing issuance of commission will be reversed upon appeal only where the surrogate has illegally or arbitrarily exercised his discretion in granting it..... 209
—— What objections to sufficiency of papers of party moving to vacate attachment, cannot be first taken on..... 105
—— Absence of findings when prevents review on appeal 143
—— Affidavits cannot be used in support of appeal from district court in the city of New York..... 157

—— When affidavits cannot be used to support appeal from justice's judgment 157
—— When new trial ordered on appeal from district court in the city of New York, although no error of law shown. 157
—— Objection that complaint in action to recover proceeds of notes converted by defendant does not allege that defendant received them in a fiduciary capacity, cannot be first taken on appeal 126
—— To court of common pleas from order of general term of city court affirming order of special term denying motion to vacate attachment will be dismissed where only point urged is that uncontradicted affidavit of defendant was not credited 398
—— To common pleas from general term of city court of New York dismissed where case does not contain judgment of general term or where corrected return has not been filed 480
—— See COUNTY COURT.
APPEARANCE—Obtaining extension of time is, and waives defects in service of summons 317
—— Evidence of authority of attorney to appear for non-resident party to action should be put upon record 366
—— When obtaining extension to plead is not 356
—— Voluntary, of defendant cures irregularity in service of summons and confers jurisdiction 356
ASSAULT—See ABATEMENT AND REVIVAL.
ASSESSMENT—Commissioners appointed to assess damages, etc., in proceedings to lay out streets when not disqualified because related to one owning property affected 12
ASSIGNMENT—Title to money on deposit when not transferred by drawing of order for payment of part thereof to third person 235
ATTACHMENT—In action against foreign corporation, affidavits to procure, must show that court has jurisdiction over subject-matter of action 336
—— Affidavit to procure made by one who acted for treasurer of corporation and conducted negotiations and completed transactions and within whose personal knowledge the facts were, and which states the source of information and belief as to all facts not stated upon personal knowledge, is sufficient 186
—— Junior attaching creditor moving to vacate a prior attachment must show every step in his own procedure, and this he should do by producing the papers upon which his attachment was granted 297
—— Motion to vacate, issued against foreign corporation in action for goods sold and delivered properly denied where plaintiff, in answer to defendant's assertions that the term of credit had not expired, showed that the credit was procured by false representations 214
—— Issued out of city court of New York against domestic corporation on the ground that it has not a place of business within

the city will not be vacated merely because the certificate of incorporation names that city as the place where its principal place of business is located..... 314
—— Is not merged in judgment or discharged by its recovery..... 94
—— When return of, unauthorized..... 94
—— When improper return of, may be cancelled and writ taken from files of court and returned to sheriff..... 94
—— Objection that junior attaching creditor does not show, on motion to vacate prior attachment, that any attachment had been obtained by him, cannot first be taken on appeal from order vacating the prior attachment..... 105
—— Objection that irregularity in attachment attacked is not specifically stated in motion papers, cannot be first taken on appeal..... 105
—— Warrant of, is void if it fails to state the ground on which it was granted..... 105
—— What defects in warrant of, may be cured by amendment..... 105
—— See APPEAL.
ATTORNEY—When notice to attorney of restrictive covenant relating to real property is notice to his client..... 1
—— See APPEARANCE; BILL OF PARTICULARS; COSTS; EVIDENCE.
ATTORNEY'S LIEN—Does not prevent parties to action settling it where attorney is not thereby defrauded..... 57
—— When settlement of action between parties may be disregarded because a lien for costs is claimed by an attorney for one of the parties..... 67
—— Not affected by a client's assignment of judgment to third party..... 274
—— *Note on the effect of certain assignments on attorney's lien*..... 279
—— Assignment of cause of action *pendente lite*, 279; general assignment, 279; assignment of judgment, 280; assignment of attorney's claim for services, 280; assignment of attorney's lien, 281; agreements to transfer, 283; assignment to attorney..... 289
BAIL—When money deposited in lieu of, cannot be reached in supplementary proceedings..... 178
BILL OF PARTICULARS—When not ordered after reference directed but before hearing of application for substitution of attorneys..... 89
BILLS, NOTES, ETC.—Rights of parties to draft, are governed by law of place of payment..... 186
—— Drawer of draft undertakes that drawee will be found at place where he is described to be and will there pay such draft, and that if it is not paid he will, after being notified thereof, himself pay it..... 188
BOOKS—See EVIDENCE.
CAUSE OF ACTION—When and where, arises on contract..... 178
CERTIORARI—May be quashed on motion where writ not issued within time limited by statute..... 116

CITY COURT OF NEW YORK—Is not a superior city court..... 59
—— Has jurisdiction of action brought by foreign corporation against domestic corporation not having any office in the city..... 186
—— Does not acquire jurisdiction by service of a summons without the state requiring defendant to answer within six days..... 356
—— See APPEAL; ATTACHMENT; JURISDICTION.
CLOUD UPON TITLE—Action to remove, consisting of instrument void upon its face does not lie..... 330
CODE OF CIVIL PROCEDURE—Section 46 to be strictly construed. 12
—— Section 1583 unconstitutional..... 388
COMMISSION—May issue out of surrogate's court to secure testimony for use in a special proceeding therein..... 209
—— Irregularities consisting of the taking of testimony under oral commission in narrative form instead of by questions and answers are waived where there is a failure to promptly object.... 184
—— Open, not granted merely because witness is adverse..... 34
—— Open, should only be granted in exceedingly peculiar circumstances..... 34
—— Motion to suppress, after trial of action upon which it has been read in evidence.....297, 304
—— See APPEAL.
COMPLAINT—See PLEADING.
CONDEMNATION PROCEEDINGS—Commissioners to lay out streets when not disqualified because related to one owning interest in property affected..... 12
CONTEMPT—See SUPPLEMENTARY PROCEEDINGS.
CONTRACT—Where there is no evidence as to where a contract was entered into and it appears that both parties were then residents of New Jersey that is presumptively the place of contract.... 178
—— Contract to pay for use of teams in New Jersey, is presumptively in absence of evidence to the contrary an agreement to make the payment within the state..... 178
—— Breach of contract to pay for use of teams when and where arises..... 178
CORPORATION—Residences of, is within bounds of sovereignty which created it..... 178
—— Organized under laws New Jersey is a foreign corporation... 178
—— See ABATEMENT AND REVIVAL; ATTACHMENT; JURISDICTION; SERVICE.
COSTS—When claim proved amounts to less than $400 and defendant, therefore, entitled to costs because plaintiff recovered less than $50..... 190
—— When both parties entitled to..... 198
—— Cannot be awarded against executor in action on debt of his decedent unless claim has been duly presented or its payment unreasonably resisted or a reference refused, and it is not unreasonably resisted unless it has been presented nor where it is materially reduced..... 121

—— What presentation of claim sufficient to entitle plaintiff to costs..... 121
—— Award of, by what statute governed in action removed to court of common pleas from district court..... 41
—— Provisions as to, apply to court in which action is tried rather than the one in which it was originally brought..... 41
—— Both parties are not entitled to, because complaint dismissed as to two causes of action, and plaintiff has a verdict on the third cause of action for more than $50..... 43
—— Defendant entitled to, under section 3234 of Code Civil Procedure only upon a decision in his favor upon an issue of fact... 43
—— In action for partition, are in discretion of court, and may be awarded both to the plaintiff and to the defendant..... 51
—— Instance of action for partition in which costs were properly awarded both parties and charged upon the shares of the parties in fault..... 51
—— Award of, in action against the executor or administrator in the city court of New York..... 59
—— Where plaintiff permitted before trial to amend complaint on paying costs to date, defendant is not entitled to trial fee..... 10
—— What taxable in special proceeding..... 294
—— What costs taxable and to be inserted in interloctutory judgment where demurrer overruled with leave to plead over on payment of costs..... 348
—— Term fees are not taxable for terms for which cause has not been duly noticed..... 10
—— When non-payment of costs awarded on motion for peremptory mandamus not punished as a contempt..... 74
—— Attorney should be required to pay in action brought by him in name of dissolved and non-existing corporation, notwithstanding he acted in good faith and he himself was imposed upon..... 225
—— *Disbursements.* Stenographer's fees incurred on trial before referee, when not taxable..... 100
—— Fees of referee that have been fixed by him pursuant to a stipulation that he should fix the amount of his own fees cannot be taxed..... 146
—— *Allowance.* Cannot be granted in action to restrain infringement of trade-mark and recover damages where it is adjudged that a trade-mark does not exist..... 6
—— In such case damages are merely incidental, and cannot be basis for allowanee..... 6
—— Cannot be granted where subject-matter of action is not capable of money value or it money value is not shown..... 1
COUNTY COURT—On appeal for new trial from justice's court, has jurisdiction to try title of land where it does not appear that the question was litigated before the justice, and it should not dismiss the action merely because that question is then raised

and because it appears that it was also raised in the pleadings in the justice's court where the undertaking required by § 2954 of the Code of Civil Procedure was not given..... 230
COURT OF COMMON PLEAS—When has jurisdiction of action for accounting of executors and trustees..... 149
—— See APPEAL; LUNATIC.
COVENANT—See REAL ESTATE.
DAMAGES—Basis of, in action by parent for enticing away of his child..... 299
DEATH—See ABATEMENT AND REVIVAL; LIMITATION TO ACTION.
DECISION—Form of, on determining issue of law..... 421
—— Where demurrer is sustained or overruled, order for judgment is not necessary or proper, but instead there should be a decision in writing directing either the final or interlocutory judgment to be entered but not as to both..... 421
—— Request to find should not be made or passed upon, upon trial of issue of law..... 420
—— When endorsement on request to find sufficient disposition thereof, although same not noted upon margin..... 309
—— When omission to dispose of request to find will require reversal of judgment..... 309
—— How improper disposition of request to find corrected and taken advantage of..... 309
—— When findings should be made by referee on dismissal of complaint..... 143
—— Absence of finding, when prevents review on appeal..... 143
DEFINITIONS: "Recover"..... 43
—— ".Reeovery."..... 190
—— Tenant..... 269
DEMURRER—See PLEADING.
DEPOSITION—See EXAMINATION OF PARTY BEFORE TRIAL.
DISBURSEMENTS. See COSTS.
DISCOVERY AND INSPECTION—Petition for, should be by party unless his failure to make it is sufficiently excused, and it is not so excused merely by the fact that he does not reside in the county where his attorney resides..... 37
—— On application by defendant for inspection of a document he must show merits..... 37
—— See EVIDENCE.
DISTRICT COURT IN THE CITY OF NEW YORK—Affidavits cannot be used under Code Civ. Pro. § 3057 in support of appeal from, 157
—— When justice may adjourn case, after its trial has commenced, to another day..... 157
—— When new trial directed on appeal from, although no error of law shown..... 157
—— Instance of a case in which district court would have had jurisdiction of action in which the accounts of both parties exceeded the sum of $400, but the same were not proved..... 190

DOWER—Court cannot authorize committee of lunatic to release her inchoate right of dower in her husband's property..... 118
DRAFT—See BILLS, NOTES, ETC.
EJECTMENT—Severance and continuance of action where one of two plaintiffs dies *pendente lite*..... 196
EQUITY—Distinction between equitable and legal causes of action still exists, and no recovery can be had at law where the whole scope and purpose of the action is limited to equitable relief..... 380
EVIDENCE—A party calling for books and papers is not compelled to put them in evidence merely because he has called for and inspected them..... 27
—— Production of books and papers on examination before trial and their inspection does not make it necessary to put them in evidence where no examination upon them was had..... 27
—— Effect of failure to produce books pursuant to demand..... 27
—— Books of tradesmen when not admissible in, favor of party keeping them to prove cash items or dealings..... 27
—— When books not properly received in, because source of information from which entries therein were made was not shown 253
—— Entries in books made by assignee not evidence against assignor. 253
—— Testimony of physician to times when he attended decedent not testimony to privileged communication 247
—— Such testimony is material and competent where it is designed to show that decedent was not in good health when he so certified for the purpose of renewing a life insurance policy.... 247
—— What knowledge of patient's condition acquired by physician is not privileged..... 48
—— *Note on nature and existence of privilege of physician and attorney* 50
—— Where no ground of objection is, stated the only ground that can be urged in support of it on appeal is that the testimony is irrelevant and immaterial..... 79
—— Husband of party claiming interest in real estate not incompetent to testify as to conversation with decedent under whom such interested party claims..... 99
—— What interest will preclude a witness from testifying to conversations with a decedent under whom the party calling him claims. 79
—— Instance of testimony in action to declare will invalid because of fraud and undue influence which was material..... 79
—— When party calling witness not bound by his testimony because he is hostile..... 247
—— In action upon agreement of husband to pay wife weekly sum in consideration of withdrawal of suit for separation evidence to show that wife denied husband his conjugal rights is immaterial and properly excluded..... 480
—— See NOTICE TO PRODUCE.
EXAMINATION OF PARTY BEFORE TRIAL—Instance of action for personal injuries in which order for, of defendant properly granted..... 345

—— Power of court to vacate order for, is undoubted, but its exercise is discretionary..... 345
—— Instance of affidavit to obtain order for, to enable plaintiff to frame complaint which was sufficient..... 149
—— Affidavit to procure order for, need not state complete cause of action..... 149
—— Fact that cause of action may be barred by statute of limitation not sufficient reason for vacating order for, to enable plaintiff to frame complaint..... 149
—— When scope of, should not be limited..... 149
—— See EVIDENCE.
EXECUTION—When leave to issue against estate of decedent granted. 241
—— Issuance of, against property does not create lien on money deposited by judgment debtor with third person to provide for payment of certain possible liabilities..... 335
—— Where there is a question as to the priority between executions, the court may determine it, upon motion, and its determination is binding upon the sheriff..... 335
—— Lien of, attaches to surplus arising on the sale of property owned by debtor at time execution was issued..... 322
—— Priority of, over title of receiver appointed after it was issued. 322
—— When return of may be required, although sixty days have not elapsed since it was issued..... 414
—— See SUPPLEMENTARY PROCEEDINGS.
EXECUTOR AND ADMINISTRATOR—Assignee of claim against decedent may petition for its payment..... 72
—— See COSTS.
FINDINGS—See DECISION.
FORCIBLE ENTRY AND DETAINER—See SUMMARY PROCEEDINGS.
FORECLOSURE—Failure of guardian *ad litem* to file formal answer does not invalidate judgment, but is a mere irregularity which may be cured by permitting the answer to be filed at any time *nunc pro tunc*..... 416
—— Referee to sell is not required to take oath after his appointment or give a bond or qualify in any formal manner..... 416
—— Where mortgage held invalid in action to foreclose it, judgment cannot be rendered in favor of plaintiff on bonds..... 380
—— When judgment for deficiency may be granted after sale of mortgaged premises under prior mortgage..... 426
FORMER ADJUDICATION—When determination upon appeal from order vacating injunction decisive in same court on appeal from judgment..... 1
FRAUD—Instance of case in which it was held that a quitclaim deed executed by the owners of the equity of redemption of mortgaged premises to cure a possible defect in the foreclosure was not obtained by fraud or false representations..... 416

GUARDIAN—When special, should be appointed by surrogate for infant on accounting of administratrix..... 377
—— Notice of application for appointment of special, of infant not necessary where surrogate appoints *ex mero motu*..... 377
—— In such case papers need not state whether infant resides with his parents and approves the application..... 377
—— Appointment of special guardian by surrogate not revoked by subsequent appointment of general guardian..... 377
GUARDIAN AD LITEM—Failure of, of infant defendant to serve general answer in action for foreclosure does not invalidate judgment..... 416
HIGHWAY—See ASSESSMENT; CONDEMNATION PROCEEDINGS.
HUSBAND AND WIFE—See EVIDENCE.
INFANT—See GUARDIAN; GUARDIAN AD LITEM.
INJUNCTION—When not granted to restrain disposition of property pending action..... 218
INSPECTION—See DISCOVERY AND INSPECTION.
INTERPLEADER—Court cannot settle conflicting claims on motion for..... 112
—— Motion for, must be denied when amount defendant offers to deposit is less than the sum claimed..... 112
—— Cannot be ordered where defendant is a wrong-doer as to either party..... 112
—— Claim of third person must have some reasonable foundation and must be supported by proof showing that it is doubtful whether the defendant in an action can safely pay claim in suit to plaintiff before such third person will be substituted in place of defendant..... 165
—— Notice of application for order of, must be given to all persons sought to be interpleaded..... 165
—— What payment into court should be directed where interpleader ordered..... 165
JOINDER OF ACTIONS—Cause of action for nuisance cannot be united with cause of action for damages for personal injuries.... 16
JUDGMENT—What claims between defendants cannot be determined..... 253
—— See ATTACHMENT; FORECLOSURE.
JUDICIAL SALE—See PARTITION.
JURISDICTION—City court of New York has, of actions upon drafts payable within this state brought by foreign corporation against domestic corporation not having any office in the city of New York..... 186
—— When objection to, of court in action against foreign corporation sufficiently taken..... 178
—— When court has not jurisdiction of action against foreign corporation..... 178
—— Jurisdiction of court in action against foreign corporation

cannot be impaired or enlarged by consent of parties or omission to object thereto..... 178
—— Objection to want of jurisdiction of action against foreign corporation may be taken at any time and where it appears the court should dismiss the action *ex mero motu*..... 178
—— See NEW TRIAL; SURROGATE'S COURT.
JUSTICE—Provision of Code of Civil Procedure disqualifying justice because of relationship to party in interest should be strictly construed..... 12
JUSTICE'S COURT—The fact that pleadings raise question of title to land does not deprive justice of jurisdiction where the defendant fails to give an undertaking as required by Code Civ. Pro. § 2954, and the question is not litigated on the trial..... 330
—— When affidavits cannot be used in support of appeal from.... 157
—— Power of justice to adjourn case after trial commenced..... 157
—— See DISTRICT COURT IN THE CITY OF NEW YORK.
LIBEL—See PLEADING.
LIEN—See ATTORNEY'S LIEN.
LIMITATION TO ACTION—When *lexi fori* governs..... 351
—— To action upon judgment of a district court of Colorado.... 351
—— Does not commence to run against cause of action to foreclose lien upon chattel pledged to secure a debt, so long as the right to redeem exists, and where such right is not limited by agreement, and has not been asserted, the action is not barred by any lapse of time..... 371
—— Parties seeking to avoid where statutory time has expired, must bring himself expressly within some of the exceptions specified in the statute..... 362
—— Delivery of process to sheriff for service will not defeat statutory bar running unless it is followedby service and this, although the defendant dies within sixty days after the delivery of the process to the sheriff..... 318
—— Time to sue upon bonds not extended by judgment subsequently reversed, rendered in action of replevin awarding maker thereof possession thereof..... 362
—— See EXAMINATION OF PARTY BEFORE TRIAL.
LUNATIC—Jurisdiction of supreme court and court of common pleas in New York county over property of..... 118
—— Inchoate right of dower of, in husband's real property cannot be released..... 118
MANDAMUS—When non-payment of costs awarded on motion for peremptory, not punished as a contempt..... 74
MANDATE—See AMENDMENT; SUMMONS.
MORTGAGE—See FORECLOSURE; PLEADING.
NEGLIGENCE—See ABATEMENT AND REVIVAL.
NEW TRIAL—Motion for, on newly discovered evidence should be made on case..... 297

—— When, not granted on newly discovered evidence because of laches. 304
—— When ground for suppression of commission no ground for granting new trial..... 304
—— Should be ordered on appeal where objection to jurisdiction improperly overruled, but it is possible that the plaintiff may cure such defect by further evidence..... 178
—— See APPEAL.
NOTICE—See ATTORNEY; RECORD.
NOTICE OF TRIAL—Is ineffectual unless note of issue is filed for term for which notice is given..... 10
NOTICE TO PRODUCE—Effect of failure to produce pursuant to demand..... 27
—— Production of books pursuant to, does not make it necessary for party demanding their production to introduce them in evidence notwithstanding he has inspected them..... 27
PARENT AND CHILD—See DAMAGES.
PARTITION—Action for, is equitable..... 51
—— Where plaintiff attacks the validity of will under which a party to an action claims he must allege the invalidity in his complaint and prove it upon the trial, and where he has had notice of the defect in his complaint consisting of the failure to aver such invalidity, an amendment should not be allowed upon the trial.. 79
—— Right to maintain action for partition by one claiming as heir of decedent property apparently devised to another exists only by statute..... 79
——*Note on action for partition of real property by an heir at-law who asserts that an apparent devise thereof is void* 87
—— Purchaser at sale under judgment in action for, of real property not compelled to take title where authority of attorney to appear for non-resident defendant not served with process does not appear..... 366
—— Purchaser at partition sale is entitled to purchase under judgment binding upon the parties, and cannot be compelled to take title under a judgment which several of the parties might as a matter of right claim should be set aside..... 366
—— Decree in, directing sale which provides for payment of the share of a party to the party or his attorney is irregular; it should direct the payment of costs to the attorneys, and of the shares to the respective parties..... 366
—— Section 1582 of the Code of Civil Procedure, as amended by Laws of 1891, chap. 365, providing for the distribution of unclaimed money arising from sale in action for partition paid into court, or to treasurer of a county, for the use of an unknown owner, is unconstitutional because it does not provide for service of notice upon known heirs not parties to original suit, and also because it divests next of kin and devisees of property thitherto vested in them..... 388

—— See Costs.
PAYMENT—Where to be made when no place of payment stated, 178
—— See Interpleader.
PHYSICIAN—See Evidence.
PLACE OF TRIAL—Demand for change of, may first be served with amended answer..... 205
PLEADING—Defence on merits will not be stricken out of pleadings, because it also contains what may be considered a demurrer..... 319
—— *Amendment.* When complaint in action for partition not amended at trial so as to allege the invalidity of a will under which a defendant claims..... 79
—— Complaint cannot be amended after verdict so that it shall demand judgment against a defendant against whom no judgment was originally asked..... 299
—— See Costs.
—— *Complaint.* Where, in action for ejectment, what purports to be description of property sought to be recovered is description merely of a straight line, demurrer thereto on ground that it does not state sufficient facts should be sustained..... 25
—— Objection that complaint in action to recover proceeds of notes alleged to have been converted by defendent, does not allege that defendant received them in a fiduciary capacity when not sufficiently taken on trial..... 126
—— The requirement of section 549 and 550 of the Code of Civil Procedure that the ground of arrest in all cases except that substituted for the old writ of *ne exeat*, should be stated in the complaint changed the nature of certain actions, by requiring the allegation and proof of additional facts, but it did not authorize the setting forth of conclusions of law..... 126
—— Where the facts alleged show that money converted was received in a fiduciary capacity, it is not necessary to allege in express terms that it was so received..... 126
—— In action to have judgment foreclosing mortgage declared void averments that court never acquired jurisdiction of plaintiffs, and that judgment is void, are either characterizations or conclusions, and not averments of material facts..... 417
—— Instance of, which was insufficient because it failed to state demand for performance of contract..... 326
—— Instance of complaint in action against railroad company to compel payment of interest on bonds, in which it was held that a contract that earnings of the road should apply to the payment of interest after payment of "all expenses, including necessary repairs," covered the building of its railroad when necessary, and that, where expenditures for such rebuilding are claimed to be improper, facts showing that they were not necessary repairs should be alleged..... 326
—— Allegations in complaint that defendant did certain things wrongfully insufficient..... 326

—— Allegations in complaint that the defendants did certain things improvidently, and that certain work done by defendant was not necessary for the maintenance and operation of its railway, are not allegations of fact, and on demurrer should be disregarded.. 326
—— *Demurrer.* Allegations in complaint that defendant did certain things improvidently, and that certain work done by defendant was not necessary for the maintenance and operation of its railway, state conclusions and not facts, and should be disregarded on demurrer..... 326
—— A pleading defective because it states conclusions instead of facts is not aided by the provision of § 592 of the Code of Civil Procedure that a pleading is to be liberally construed..... 326
—— Where in action for ejectment, what purports to be description of property sought to be recovered is description merely of a straight line, demurrer thereto on ground that it does not state sufficient facts should be sustained..... 25
—— Fact that causes of action stated in complaint are not separately stated and numbered does not prevent demurrer thereto on ground that causes of action have been improperly united..... 16
—— In action for libel, allegation that the publication was true is new matter and may be demurred to as insufficient in law upon the face thereof..... 348
—— *Answer.* Amended, supersedes all of defendant's former pleadings..... 205
—— In action for libel, answer alleging truth of parts of the publication is insufficient unless specifically pleaded as partial defense or in mitigation of damage..... 348
—— In action for libel, defense of justification should be as broad as the charge and of the very charge attempted to be justified.... 348
—— *Verification.* A answer in action to recover damages for deceit and false representations, must be verified if complaint is... 388
—— Section 523 of the Code of Civil Procedure, providing for the omission of the verification of a pleading where the party would be privileged from testifying as a witness, is limited by § 529, providing that a party is not excused from verifying his answer where he is charged with any fraud affecting the right or property of another..... 388
PLEDGE—By pledge of chattel as security for debt its title does not pass, but remains in pledgor until divested by sale upon notice or by judicial proceeding, and the rights of the pledgor pass by assignment made by him for benefit of his creditors... 371
—— Right of pledgee to hold possession of pledge not affected by recovery of judgment on indebtedness secured thereby, nor by appointment of receiver of pledgor's property in supplementary proceedings and the extension of the receivership to the pledgee's judgment..... 371
—— Pledgee of stock pledged without consent of owner cannot ap-

ply surplus realized upon sale to repayment of an individual loan made by him to the pledgor..... 253
PRIVILEGED COMMUNICATION—See EVIDENCE.
PROCEEDINGS SUPPLEMENTARY TO EXECUTION—See SUPPLEMENTARY PROCEEDINGS.
REAL ESTATE—See CLOUD UPON TITLE.
REAL PROPERTY—Purchaser of, with notice of equity attached to it, takes subject thereto..... 1
—— When purchaser has notice of restrictive covenant..... 1
—— When purchaser conclusively presumed to have notice of restrictive covenant from record..... 1
—— Inchoate right of dower of lunatic in her husband's real property cannot be released..... 118
—— Purchaser of land from husband of lunatic may properly refuse to accept deed thereof executed by him and the committee of the lunatic..... 118
RECEIVER—In action to prevent waste of funds of foreign corporation, upon proof of necessary facts court has jurisdiction to appoint receiver *ex parte* and although it has not acquired jurisdiction over the person of the defendant..... 437
—— When judgment creditor liable for costs of action brought by receiver and in which he was defeated..... 393
—— *It seems* that such costs cannot be paid out of money belonging to judgment debtor..... 393
—— Payment of such costs should not be deferred until receiver has collected assets belonging to the judgment debtor which he is then pursuing..... 393
RECORD—When defective record of contract restricting use of real property does not prevent its being noticed to party purchasing property..... 1
REFEREE—Stipulation that referee fix the amount of his fees is invalid..... 149
—— When new trial must be had before referee after reversal of former judgment..... 22
—— See DECISION.
RESIDENCE—See CORPORATION; CONTRACT.
SECURITY FOR COSTS—May be required as condition of reviving action in equity against executrix of deceased defendant..... 161
—— Requiring, in actions by or against executor, is purely discretional with court..... 161
—— May be required in such case even on appeal..... 161
—— Court of equity has inherent power to require from plaintiff even in case not within the words of the statute..... 161
SERVICE—When party coming within state to testify as witness not exempt from service of summons because he delayed his departure too long..... 201
—— Exemption of non-resident coming here to testify as witness

from service of summons applies where the witness is sought to be served as officer of a foreign corporation..... 201
—— What officer of corporation is not managing agent within meaning of provisions of Code of Civil Procedure providing for the service of a summons upon a corporation by delivering it to its managing agent..... 434
—— Proof of service of summons upon foreign corporation by delivering it to its managing agent should show that diligent effort had been made to serve the president, secretary or treasurer of the corporation, and that they could not with due diligence be found within the state..... 437
—— In such case mere allegation that person served was a managing agent is insufficient, but the facts showing him to be such should be set forth..... 437
—— Defects in, of summons waived by obtaining extensions of time to plead..... 317
SPECIAL PROCEEDINGS—See Costs.
STATUTE—Penal, will not be so construed as to result in infliction of punishment which may not have been intended..... 74
—— In statute making failure to pay costs punishable as a contempt, permissive expressions should not be considered as mandatory..... 74
—— See Code of Civil Procedure.
STENOGRAPHER—See Costs.
STIPULATION—When made in open court has same force and effect as if made in writing..... 22
—— To refer remains operative so far as prescribing mode of trial is concerned until cause is finally disposed of..... 22
—— That referee fix the amount of his own fees is invalid..... 146
SUBMISSION OF CONTROVERSY—Court cannot draw inferences with respect to fact not stated..... 351
SUBSTITUTION OF ATTORNEYS—See Bill of Particulars.
SUMMARY PROCEEDINGS—Statute relating to summary proceedings to be strictly construed..... 269
—— Petition in, in case of forcible entry and detainer, must set forth petitioner's title or estate..... 269, 271*n*
—— Simply alleging that petitioner is entitled to premises is not sufficient..... 269
—— Jurisdiction not acquired where allegation of interest insufficient..... 269, 271*n*
—— Technical objection will defeat..... 269
—— Enforcement of warrant will be enjoined where petitioner's interest in premises not sufficiently stated in petition..... 271*n*
SUMMONS—Jurisdiction is not acquired by city court of New York by service of summons upon defendant without the state requiring him to answer within six days..... 356
—— See Service.

SUPPLEMENTARY PROCEEDINGS—When abandoned 216
—— What use of, property not contempt..... 216
—— Where a debt which cannot be levied on under execution is paid to the sheriff pursuant to an order in supplementary proceedings, the lien acquired in the supplementary proceedings follows said fund into the sheriff's hands, and the moneys should be applied to the satisfaction of the judgment of the creditor maintaining said proceedings, notwithstanding there is a prior execution upon another judgment in the hands of the sheriff.... 235
—— Property delivered to sheriff pursuant to order in supplementary proceeding is to be treated as if levied upon by virtue of an execution issued by the judgment creditor who instituted the proceedings..... 235
—— Is substitute for creditor's bill in equity, and service of order for examination therein gives creditor lien on assets of debtor... 235
—— When money deposited in lieu of bail cannot be reached in... 173
SUPREME COURT—See LUNATIC.
SURROGATE'S COURT—Extent of jurisdiction of, to construe will. 55
—— Jurisdiction of, is limited to case in which it is expressly conferred by statute and to such incidental powers as are required in the proper exercise of the powers expressly conferred..... 55
—— Assignee of claim against decedent may petition for its payment..... 72
—— Power conferred upon surrogate by statute cannot be limited by a rule made by himself, and a rule so made has no bearing whatever upon the validity of an order made by him..... 377
—— See APPEAL; COMMISSION; GUARDIAN.
TRESPASS—Instance of action to recover damages to plaintiff's trees in which the evidence did not sufficiently show that defendant had inflicted the injuries..... 434
TRIAL—What claims cannot be litigated between defendants..... 253
—— A judge or jury called upon to determine a fact upon the testimony of witnesses may properly refuse to credit the testimony of a witness who is a party in interest, although it be wholly uncontradicted and his credibility is not otherwise impaired..... 398
—— See PLACE OF TRIAL.
UNDERTAKING—Liability of sureties in, on appeal from justice's court..... 290
VERIFICATION—See PLEADING.
WAIVER—When irregularity in executing commission waived.... 134
—— See APPEARANCE.
WILL—See SURROGATE'S COURT.
WITNESS—See EVIDENCE; EXAMINATION OF PARTY BEFORE TRIAL.

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